Supreme Court, U.S.
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No. 99-991519

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JOE BAILEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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March 14, 2000

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QUESTION PRESENTED

May a railroad be found liable for intentional age discrimination under state law for taking action that a Railway Labor Act arbitration board concluded was required by the terms of the railroad's collective bargaining agreement, when the agreement is not itself challenged as discriminatory and the railroad has applied it uniformly?

LIST OF PARTIES AND RULE 29.6 LIST

The petitioner is Norfolk Southern Railway Company, the successor by merger to Norfolk and Western Railway Company, which was the defendant in the Circuit Court for McDowell County.

Respondents are the following individuals, who were plaintiffs in the consolidated civil actions:

Bailey v. Norfolk & Western Ry.:

Joe Bailey, Ron Barnhill, Donald Blackwell, Joseph Blevins, Elbert Bolen, Jr., Michael L. Bratton, Arthur Brown, Jr., Gary M. Caldwell, Richard Carper, Jeremiah C. Cochran, Crockett S. Davidson, Richard D. Dissibbio, Troais Haden Ellison, Jr., David R. Ernest, John W. Fine, R. F. Foster, Jr., Edward B. French, Jack H. Gillespie, George C. Graham, Roger S. Hale, Ronald Billy Hatfield, Douglas B. Hedrick, Mack Allen Law, James N. Lucas, Norman C. Mabe, Allen D. Marchant, David L. Marsh, Roger W. Martin, Harold Lee Miller, R. D. Miller, III, Ronald E. Millsap, Frank W. Mitchell, Donald H. Norman, James W. Painter, Raymond E. Poole, Roger W. Proffitt, Sesto Punturi, Jr., Kenneth Wayne Richardson, Emmett W. Sanders, Larry J. Sarver, Ronald Wayne Simmons, Thomas Junior Simmons, Perry C. Simpson, Jerry W. Smith, Roger Lee Smith, Ronald C. Thomas, Robert K. Tiller, Jerome D. Travers, David Benton Varney, E. R. Weatherly, Jimmy L. Woody, William F. Yost.

Caldwell v. Norfolk & Western Ry.:

Eddie S. Caldwell, Fred B. Caldwell, Jr., John E. Damron, Jr.,Tommy D. Deskins, Robert R. Fulp, D. R. Harry, Lester Hawkins, Sr., Hubert J. Horn, Wesley L. Hurt, Jack L. Kipfinger, Melvin L. Pannell, Randolph Parham, Jack Lee Sarver, S. C. Shrewsbury, Jr., Isaac L. Wilson.

The common stock of petitioner Norfolk Southern Railway Company is wholly owned by Norfolk Southern Corporation, which is a publicly held corporation.

The non-wholly-owned subsidiaries of Norfolk Southern Railway Company are:

High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
North Central Carolina Midland Railroad Company, The
South Western Rail Road Company, The
State University Railroad Company
Yadkin Railroad Company

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IN THE

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NORFOLK SOUTHERN RAILWAY COMPANY,
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On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR WRIT OF CERTIORARI

Petitioner Norfolk Southern Railway Company ("NSR" or "the Railroad") requests that this Court issue a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia, entered on December 15, 1999.

OPINIONS BELOW

The December 15, 1999, decision of the Supreme Court of Appeals of West Virginia is not reported and is reprinted in the Appendix to this Petition ("App.") at 1a. The judgment of the Circuit Court for McDowell County, West

Virginia, dated March 11, 1997, entered on a jury verdict, which was the decision under review in the Supreme Court of Appeals, is not reported and is reprinted in the Appendix at 49a

JURISDICTION

The Supreme Court of Appeals of West Virginia entered its decision on December 15, 1999. The petition is timely filed. Jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Supremacy Clause of the United States Constitution, Art. VI, cl. 2; sections 2 and 3 of the Railway Labor Act, 45 U.S.C. §§152, 153; and the West Virginia Human Rights Act, W. Va. Code §§5-11-1, *et seq.* The pertinent texts are set out in the Appendix at 56a, 57a, 58a and 62a.

STATEMENT OF THE CASE

On NSR, as on all other major freight railroads in the United States, train crews are made up of employees in three separate crafts: locomotive engineers, trainmen (or "brakemen") and conductors. This case concerns trainmen and conductors, all of whom are represented by the United Transportation Union ("UTU").

On NSR, as on other railroads, in accordance with the governing UTU labor agreements, employees in each craft are assigned seniority dates and ranked in seniority order on a craft roster; they draw their work assignments in accordance with their craft seniority. Historically, employees have been hired as trainmen and, in accordance with the labor agree-

ments, were entitled, but not required, to be promoted to conductor, a supervisory position. Moreover, employees who accepted promotion to conductor were free to resign their conductor rights and return to the trainman ranks.

The governing labor agreement on NSR, first adopted in 1954 and still in effect, provided that a trainman who was promoted to conductor would be assigned a conductor seniority date that is the date on which he passed the required examination and would be placed at the bottom of the conductor seniority roster.

Labor agreements with the UTU traditionally required two or more trainman positions, in addition to one conductor position, on each freight train. By the 1980s, the railroads needed fewer trainman positions and also wanted to maintain an adequate work force of conductors to fill conductor positions. Accordingly, in 1985 they negotiated with the UTU, at the national level, an agreement that permitted them to require trainmen hired thereafter to accept promotion to conductor as their turn came up, in seniority order. The agreement also barred such employees from giving up their conductor rights in order to return to the trainman ranks.

The assignment of seniority to conductors promoted under the 1985 national agreement was handled in local labor agreements on the separate railroads. On the pertinent geographic portion of NSR, the Railroad and the UTU agreed, in a 1988 "memorandum" agreement, that when trainmen hired on or after November 1, 1985, became conductors, they would be placed on the conductor roster in accordance with their relative standing as trainmen rather than in accordance with the sequence in which they passed the conductor examination. The 1988 agreement did not apply to trainmen hired prior to November 1985; they continued to be governed by the 1954 agreement.

In the next round of national bargaining, which began in late 1988, the railroads sought to obtain an agreement with the UTU that would, among other things, permit them to require the "pre-November 1985" trainmen to accept promotion to conductor. When the negotiators could not reach an agreement, a Presidential Emergency Board ("PEB"), appointed under the Railway Labor Act ("RLA"), 45 U.S.C. §160, recommended in 1991 that the parties make an agreement that would include a provision authorizing the railroads to require all trainmen to accept promotion to conductor.

The PEB's recommendations became binding as the result of legislation that ended a one-day national rail strike, Pub. L. 102-29, 105 Stat. 69 (1991). Under that enactment, a "Special Board" composed of rail industry arbitrators was empowered to hear objections to the recommendations and decide whether to modify them; unless modified, the recommendations would become binding, as though reached through negotiations under the RLA. Objecting to the conductor promotion recommendation, the UTU told the Special Board that on most railroads (as on NSR), the agreements applicable to trainmen hired before November 1985 would require those trainmen, when promoted, to be placed on conductor seniority rosters on the basis of their promotion dates rather than their original trainman dates. This would cause the newly promoted conductors to be the most junior in seniority, and therefore to be ranked lower than employees who had been hired as trainmen after November 1, 1985, but who had already established seniority as conductors—a circumstance that the UTU argued was unfair. The Special Board nevertheless found the PEB's recommendations to be "fair and demonstrably equitable" and allowed them to take

effect. The UTU and the railroads reduced the recommendations to a national agreement effective November 1, 1991.[1]

NSR, like the other railroads, proceeded to implement the new authority by promoting all 2,067 of its pre-November 1985 trainmen to conductor on April 1, 1992. Included in that group were the 67 respondents, at least 52 of whom had previously been conductors but had relinquished their conductor rights. Because the UTU had refused to negotiate a new agreement to modify the existing rules governing establishment of conductor seniority dates on the territory where respondents worked, NSR applied the still-effective 1954 labor agreement and gave each respondent a conductor seniority date of April 1, 1992. This placed respondents at the bottom of the seniority roster covering their territory, behind (as of the time of trial) 459 other conductors, including 133 who had been hired as trainmen on or after November 1, 1985, and had therefore been required to accept promotion to conductor prior to respondents.[2]

On behalf of the trainmen on respondents' territory, the UTU took exception to the Railroad's promoting pre-

[1] Art. V of the national agreement provides: "All trainmen must accept promotion to conductor/foreman when offered by the railroad. Once promoted, trainmen, including those already promoted, will not be permitted to voluntarily relinquish conductor/foreman rights. * * * Except as modified hereby, existing rules and practices governing promotion continue in effect." Defendant's Trial Exh. 7. Accordingly, the 1991 national agreement did not modify existing agreements concerning the establishment of seniority dates.

[2] The trainmen promoted to conductor on April 1, 1992 retained their trainman seniority (as had always been the case under the 1954 agreement). However, they cannot exercise that seniority to fill trainman positions if there are available conductor positions for them to fill.

November 1985 trainmen and placing them at the bottom of the conductor roster. The Railroad and the union submitted two questions for decision by Public Law Board No. 4721, an arbitration panel created by them under the RLA, 45 U.S.C. §153 Second (second paragraph), and chosen by them to resolve the dispute: (1) does the 1991 national agreement require all trainmen to accept promotion when offered, and (2) if so, is the Railroad's method of placing the newly promoted trainmen onto the conductor seniority roster in accordance with the governing labor agreement? In its August 24, 1992, award, App. 82a, the arbitration board upheld the Railroad. The board held, first, that under the plain terms of the 1991 national agreement, the Railroad had the right to require all unpromoted trainmen to accept promotion to conductor. Second, the board held that the Railroad had properly applied the governing 1954 agreement when it placed the newly promoted conductors at the bottom of the conductor seniority roster.[3]

Following issuance of the arbitration award, respondents filed suit against the Railroad in 1993 in the Circuit Court for McDowell County, West Virginia under the West Virginia Human Rights Act, W.Va. Code §§5-11-1 *et seq.* ("HRA"), alleging intentional age discrimination and seeking injunctive relief, compensatory damages in the amount of $1 million per plaintiff, and punitive damages.[4] The liability portion of the case was tried to a jury in the Circuit Court for McDowell County in February 1997.[5]

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[3] Neither the UTU nor respondents sought judicial review of the arbitration award under the RLA, 45 U.S.C. §153 First (q).

[4] The HRA prohibits employment discrimination on the basis of age, which is defined as "the age of forty or above." W.Va. Code §§5-11-3(k), 5-11-9. App. 63a, 65a.

[5] Two civil actions were filed: *Joe Bailey, et al. v. Norfolk &*

At trial, respondents, who were required to become conductors pursuant to the 1991 national agreement, contended that the Railroad violated the HRA by applying to them the rule for determining conductor seniority provided in the 1954 agreement, rather than the seniority rule found in the 1988 agreement. The 1988 agreement rule had been applied to employees hired on or after November 1, 1985, all of whom had been required to become conductors as a result of the 1985 national agreement. Respondents asserted they would have been better off if the rule in the 1988 agreement had applied to them, because that rule would have preserved their "relative standing" as trainmen and would have caused them to be put hundreds of places higher on the conductor roster. They asserted that the two labor agreements, coverage of which was mutually exclusive, provided two "rules" that the Railroad had adopted, between which the Railroad was free to choose in deciding where to place respondents on the conductor roster. Respondents observed that the trainmen hired on or after November 1, 1985, were, on a percentage basis, younger than the trainmen hired before that date (although many pre-November 1985 trainmen were less than 40 years of age and many of the subsequently hired trainmen were over 40). Respondents contended that the Railroad's use of the 1954 agreement's rule, rather than the 1988

Western Railway, No. 93-C-441-K (52 plaintiffs), and *Eddie S. Caldwell, et al. v. Norfolk & Western Railway*, No. 94-C-39-K (15 plaintiffs). The Railroad removed both to the United States District Court for the Southern District of West Virginia and sought dismissal on the ground of total preemption by the RLA. The two cases were remanded and consolidated. The liability and remedies phases were bifurcated. The trial court denied the Railroad's motion to join the UTU as a defendant and denied the Railroad's motions for summary judgment, directed verdict, and judgment notwithstanding the verdict, App. 53a.

agreement's rule which they would have preferred, amounted to intentional age discrimination violative of state law.

The Railroad argued throughout the trial that, by operation of the RLA, the arbitration board's ruling that the 1954 agreement required the Railroad to place respondents at the bottom of the conductor roster was conclusive for purposes of the HRA claim. When the Railroad asked the trial court to instruct the jury concerning the binding nature of the arbitration board's interpretation of the 1954 agreement, it got something quite different. See App. 70a-71a, 72a. The trial court altered the Railroad's proposed instruction and instructed the jury that the arbitration board had ruled that the "placing of [respondents] on the bottom of the conductor roster was *permitted* by the 1954 labor agreement," *id.* 72a (emphasis added)—rather than *required* by that agreement, as the arbitration board had ruled. By changing the instruction, the court defeated its purpose. The effect of the instruction as given was that the jury was not bound, in assessing the lawfulness of the Railroad's action under state law, by the arbitration board's determination that the Railroad was obligated to apply its labor agreement as it did, as a matter of federal law.

The jury returned a verdict form on which it found: (1) the Railroad had "intentionally discriminated against the plaintiffs on the basis of age"; (2) "an illicit bias against employees forty years of age or older was a motivating factor in [the Railroad's] decision to place plaintiffs at the bottom of the conductor seniority roster with a conductor date of April 1, 1992"; and (3) the Railroad had not "shown by a preponderance of the evidence that it would have placed plaintiffs on the bottom of the conductor seniority roster with a conductor date of April 1, 1992 even absent the impermissible age motivation." App. 51a.

On appeal from the liability verdict (proceedings to determine remedies having been stayed pending appeal), the Supreme Court of Appeals of West Virginia found that respondents' "theory of the case, as argued at trial, was that the Railroad sought refuge in the collective bargaining agreements as justification for outright age discrimination." App. 13a. The court found that disposition of respondents' state law claim was "not exclusively dependent upon the terms of the collective bargaining agreements" because respondents "do not directly attack the agreements" as discriminatory. *Id.* 20a. Nor were respondents claiming that the Railroad applied the 1954 labor agreement disparately. Instead, respondents alleged that the Railroad had discriminated against them "in a more general effort to remove them from its workforce through any means available to it, including discriminatory application of the collective bargaining agreements, intimidation, and hostile comments directed toward the older workers and based upon the age of those workers." *Id.*

The Supreme Court of Appeals understood that underneath respondents' general allegations, only one act was being challenged as discriminatory: the Railroad's placement of respondents at the bottom of the seniority roster. App. 6a. Finding that the Railroad's authority to require respondents to accept promotion to conductor is "not challenged," *Id.* 20a n.11, the court held that

> [t]he Railroad in the present case applied two sets of criteria for establishing seniority rosters for those who were forced to take conductor rights. Under the burden shifting analysis applicable in a mixed motive case, the burden was ultimately upon the Railroad to prove that the challenged decision would have been made in the absence of an unlawful motive. Thus, the

> role of the jury became crucial in the resolution of the conflicting evidence.

Id. 27a.

The holding of the Supreme Court of Appeals, therefore, is that the Railroad had two available methods ("two sets of criteria") of placing newly promoted conductors on the seniority roster, that it made a decision to apply one of those methods to respondents, and that it could be found to have committed unlawful intentional age discrimination when it implemented that decision. On this basis, the court sustained the jury verdict.

It is certainly true that the Railroad had two rules governing the assignment of conductor seniority: the rules in the 1954 and 1988 labor agreements, which covered mutually exclusive groups of employees defined by the employees' dates of hire. The Supreme Court of Appeals did not find that the existence of these two agreements was itself discriminatory. As the court took pains to say, App. 20a & n.12, respondents did not attack the labor agreements. The "challenged decision," App. 27a, that the court found to constitute intentional age discrimination was the Railroad's putative act of choosing between the two supposedly available rules. More specifically, it was the Railroad's election to apply to respondents the rule in the 1954 agreement, rather than the rule in the 1988 agreement, that violated the HRA.

In reaching this conclusion, the court did not account for the effect of the arbitration board's award, which had squarely held that the 1954 agreement was the o*nly* agreement applicable to trainmen hired before November 1985 (including respondents) and that placement at the bottom of the conductor roster was the *only* outcome permissible under the 1954 agreement. The board had determined that the fact that respondents were required to become conductors (like the trainmen hired on or after November 1, 1985) did not

exempt respondents from coverage under the 1954 agreement.

Although purporting to acknowledge that its own "perception of the adequacy of the resolutions made through the existing labor agreements is irrelevant," App. 20a, the court made clear that it was really the arbitration board determination that it deemed irrelevant.

Thus, the court distinguished *Hiatt v. Union Pacific R.R.*, 65 F.3d 838 (10th Cir. 1995), which held that trainmen on other railroads who had been required to accept promotion to conductor under the 1991 national UTU agreement could not make out a claim under the federal Age Discrimination in Employment Act, on the ground that here, as the court thought not to be the case in *Hiatt*, the employees were contending "that the Railroad engaged in discrimination by applying two different standards to guide the seniority roster placement, based upon the discriminatory intent."[6] App. 26a.[7]

Before the Supreme Court of Appeals, NSR argued that, "by operation of the RLA, PLB 4721's ruling as to the meaning of the 1954 agreement is binding and conclusive on this court" and prevents recognition of a claim of age discrimination under state law that necessarily presumes the labor agreement "has some meaning other than the one PLB

[6] The court in *Hiatt* made clear that the conductors in that case were complaining about the effect on them of "the interaction of the congressional mandate and the established seniority system." 65 F.3d at 843.

[7] The Supreme Court of Appeals also invoked *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120-22 (1985), in which this Court held that an employer cannot unilaterally choose to apply different rules on the basis of the ages of the affected employees.

4721 determined." App. 81a; see also *id.* 75a. The Railroad also objected to the trial court's jury instructions as failing to honor these principles.

In this connection, the Railroad directed the West Virginia court's attention to *Owens v. Texaco, Inc.*, 857 F.2d 262 (5th Cir. 1988). App. 75a, 81a. There, the Fifth Circuit held that principles of federal labor law (in that case, necessarily embodied in §301 of the Labor Management Relations Act, 29 U.S.C. §185 ("LMRA")) dictate that an arbitrator's interpretation of the "contract status of the parties is controlling" in a statutory discrimination action (in that case, under Title VII) and precludes the recognition of a discrimination claim that contradicts the arbitrator's interpretation of the labor agreement. 857 F.2d at 264-65. The Fifth Circuit explained that *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), which held that an unsuccessful arbitration under a contractual nondiscrimination clause did not bar a Title VII civil action, did not cover the situation presented in that case, and did not call for a different result.

The Railroad made clear on appeal that it was not arguing that the RLA preempted respondents' HRA claim; there was no unresolved issue of contract interpretation that would require preemption of the state civil action under this Court's decisions. Moreover, the Railroad explained that it was not arguing that the arbitration board's award was binding on the factual question of the Railroad's motives, the matter addressed in *Gardner-Denver* but not presented in this case. App. 80a. Rather, the Railroad argued that if the arbitration board's ruling—that the 1954 agreement required the Railroad to place respondents at the bottom of the conductor roster—is given the binding effect required by the RLA, the Railroad cannot be found liable under state law for age discrimination simply for putting plaintiffs at the bottom of the conductor roster. Had this principle been honored, the

Railroad explained, the case would never have gone to the jury at all.[8]

The Supreme Court of Appeals understood the Railroad's argument, and rejected it. The court understood that, as far as the labor agreement and the RLA were concerned, the arbitration award defined what conduct of the Railroad was permissible. The court also understood that the effect of the trial court's jury instruction on the point (using "permitted" instead of "required") was precisely to tell the jury that the 1954 agreement as interpreted by the arbitration board was *not* binding on it, in that, as far as the HRA was concerned, the jury was free to conclude the Railroad had options

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[8] The Railroad argued in its appellate brief: "In the end, this case is not about age discrimination made actionable by the HRA. Rather, it represents an impermissible intrusion into the federally regulated area of railroad labor relations and the RLA's carefully constructed dispute resolution schemes. The matter of mandatory promotion to conductor was resolved at the highest levels, through national bargaining, a Presidential Emergency board, and federal legislation. Congress (through its delegate the Special Board) found mandatory promotion to be 'fair' and 'equitable,' knowing full well that, under existing labor agreements, it would result in senior trainmen like plaintiffs going to the bottom of conductor rosters. When UTU challenged [the Railroad's] implementation of the authority it received from Congress, PLB 4721 conclusively ruled in final and binding arbitration under the RLA that [the Railroad] was correctly applying the 1954 agreement by placing the newly promoted trainmen at the bottom of the conductor roster—the very result Congress had anticipated. Plaintiffs think this resolution produces a result unfair to them, and would use this lawsuit to undo it. But the HRA does not give jurors a roving commission to nullify an Act of Congress and the dictates of the facially neutral 1954 labor agreement in the absence of any evidence that would permit a rational juror to find that [the Railroad] acted out of age bias." App. 77a-78a.

available to it other than placement at the bottom of the roster. App. 34a-35a.

Consistently with its view that the Railroad *chose* where to place respondents on the seniority roster and could therefore be found liable under the HRA for its choice, the Supreme Court of Appeals endorsed the trial court's jury instruction, declining to "find that the jury could have been misled by" it. App. 35a. Moreover, the jury instructions, taken as a whole, conveyed the idea that, while the arbitration award was conclusive on the question whether the Railroad had violated the labor agreement (it had not), the award had no binding effect in the jury's consideration of the HRA claim. See App. 71a-72a. The West Virginia Supreme Court of Appeals embraced this message, and the jury instructions, on the theory that respondents' age discrimination claim did not have to be "considered in light of the agreements" at all, because the HRA and the 1954 agreement are separate sources of rights. *Id.* 35a. Indeed, the court more specifically concluded that *Gardner-Denver* controls this case by supposedly commanding that a labor arbitration award can never have a preclusive effect on a statutory discrimination claim. *Id.* 18a.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Appeals of West Virginia misconstrues the requirements of federal labor law and the Supremacy Clause of the United States Constitution, Art. VI, cl. 2. The West Virginia court's holding that the Railroad could be found to have committed intentional age discrimination under state law simply by virtue of having placed respondents at the bottom of the conductor seniority roster conflicts directly with the RLA arbitration board's ruling that the Railroad's 1954 labor agreement (which

respondents did not claim was discriminatory) required the Railroad to place respondents at the bottom of the roster.

The Supreme Court of Appeals, wrongly concluding that the rule of *Gardner-Denver* encompasses this case, treated the outcome of the RLA arbitration process as irrelevant to consideration of respondents' claim under the state human rights act. By so doing, the court elevated a state cause of action to primacy over the exclusive RLA scheme for resolving disputes respecting the meaning of labor agreements. The RLA arbitration award was not irrelevant. In the circumstances, it governed respondents' claims and required the entry of judgment for the Railroad.

This case presents an important federal question that was not addressed in *Gardner-Denver*, and that has not been, but should be settled by this Court: whether a state law claim may be upheld on the basis of a finding that conflicts with an RLA arbitration board's authoritative interpretation of the governing labor agreement. The answer is that it may not. That answer is compelled by the logic of the Court's established jurisprudence that holds (i) RLA arbitration boards have exclusive jurisdiction to resolve disputes over the meaning of railroad labor agreements, and (ii) a state law claim is preempted by the RLA if its resolution depends on interpreting a collective bargaining agreement.

The principles underlying this jurisprudence dictate that the outcome of the completed RLA arbitration process must be binding on a state court's consideration of a state law claim, as to matters within the arbitrator's exclusive jurisdiction. An arbitration award precludes recovery on a state claim where the claim is premised on an interpretation of a labor agreement that conflicts with the interpretation announced by the arbitrator.

The West Virginia court's decision is at odds with these governing principles, with Congress' intent in placing

mandatory arbitration at the heart of the RLA scheme, and with decisions of the courts of appeals that have considered the matter. The decision jeopardizes the stability of labor-management relations in the RLA-governed railroad and airline industries and in all LMRA-governed industries as well.

1. Congress enacted the RLA to promote "stability in labor-management relations" by establishing a comprehensive framework for the peaceable resolution of labor disputes. *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (per curiam). Mandatory arbitration of disputes over the "interpretation and application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. §153 First (i)—so-called "minor disputes"—is a cornerstone of the legislative design. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 34, 41 (1957); *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 325 (1972). Congress considered it "essential" that jurisdiction to interpret labor agreements reside exclusively in the National Railroad Adjustment Board or, alternatively, in arbitration boards created by a carrier and union—and not in the courts. *Sheehan*, 439 U.S. at 94,[9] *see Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 303-04 (1989). Compulsory arbitration ensures that disputes over the meaning of labor agreements will be promptly resolved in a consistent manner by decisionmakers with the expertise to accomplish the task. *Sheehan*, 439 U.S. at 94; *see Order of Railway Conductors v. Pitney*, 326 U.S. 561, 566-67 (1946) (interpretation of labor agreements requires consideration of the "usage, practice and custom" in the industry); *Slocum v. Delaware, Lackawanna & Western R.R.*, 339 U.S. 239, 243

[9] An arbitration board award is subject to judicial review only under the standards set forth in 45 U.S.C. §153 First (q), which are "among the narrowest" known to the law. *Sheehan*, 439 U.S. at 91.

(1950) (mandatory arbitration promotes "a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems").

Arbitration of contract disputes plays an equally "central role" in "our 'system of industrial self government'" established under the LMRA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)). The railroad industry (along with the airline industry) is exceptional only in that the "compulsory character" of arbitration "stems not from any contractual undertaking between the parties but from the [Railway Labor] Act itself," *Andrews v. Louisville & Nashville R.R.*, 402 U.S. at 323, and in that the RLA, unlike §301 of the LMRA, gives the courts no authority to interpret railroad labor agreements, committing that job exclusively to arbitration boards.

Because the mandatory arbitration process is so important to the smooth functioning of the federal labor scheme, it is settled that a state law claim that would intrude on the process cannot go forward. The rule is that when "resolution of a state-law claim depends on an interpretation of the collective bargaining agreement, the claim is preempted." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994).

The fact that a state law, like the HRA, may be an independent source of important, nonnegotiable substantive rights does not insulate every claim brought under that law from the preemptive force of the Supremacy Clause. Even though state law discrimination claims as a class are not preempted *per se*, when resolution of a particular claim would call upon the trier of fact to determine the meaning of a labor agreement, the claim is preempted. At that point, the state process must yield, and "federal labor-law principles" must be "employed to resolve the dispute." *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). This regime ensures that "interpretation of collective-bargaining agree-

ments remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective bargaining agreements." *Id.* at 411 (footnote omitted).[10]

Permitting state courts to interpret labor agreements under state law, by contrast, "would inevitably exert a disruptive influence upon both the negotiation and admini-

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[10] *Hawaiian Airlines* extended the *Lingle* standard for resolving claims of preemption by §301 of the LMRA to resolution of claims of preemption by RLA §3. 512 U.S. at 263.

The courts of appeals have regularly applied *Lingle* and *Hawaiian Airlines* to bar a state or federal discrimination claim when construction of a labor agreement term is necessary for resolution of the claim. Strictly speaking, the RLA and LMRA do not preempt other federal statutes but, rather, preclude their application. *See, e.g., Atchison, Topeka & Santa Fe. Ry. v. Buell*, 480 U.S. 557, 562 (1987). Nevertheless, the considerations identified in *Lingle* and *Hawaiian Airlines* operate in connection with federal claims as well, and the lower courts, following the lead of this Court, *Hawaiian Airlines*, 512 U.S. at 259 & n.6, have applied the same test to state and federal claims. *See, e.g., Schlitz v. Burlington Northern R.R.*, 115 F.3d 1407, 1410-11, 1414-15 (8th Cir. 1997) (federal Age Discrimination in Employment Act claim "preempted" by RLA; contention that railroad discriminated against plaintiff on the basis of age by refusing to let him exercise seniority rights to the St. Paul district, rather than the Northeastern district, depended on an interpretation of the labor agreement as the "issue of where [plaintiff] could assert his seniority rights had to be determined by the [agreement's] language"); *Audette v. Longshoremen's Local 24*, 195 F.3d 1107, 1113 (9th Cir. 1999) (state law sex discrimination claim preempted by §301 of LMRA); *Reece v. Houston Lighting & Power Co.*, 79 F.3d 485, 487 (5th Cir. 1996) (state law race discrimination claims preempted by §301 of LMRA). *Cf. Bielicke v. Terminal R.R. Ass'n*, 30 F.3d 877, 878 (7th Cir. 1994) (FELA claim "preempted" by RLA).

stration of collective agreements," as "neither party could be certain of the rights which it had obtained or conceded." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

2. The unsettled federal question posed by our case represents a logical extension of this established jurisprudence, which the Supreme Court of Appeals of West Virginia misconstrued.

In the *Lingle/Hawaiian Airlines* context, a state law claim is preempted because it depends on an unresolved issue of contract interpretation, which may be resolved only in arbitration. Here, the Railroad and respondents' labor union had already obtained an authoritative arbitral determination of the Railroad's obligations and respondents' rights under the applicable labor agreements before the state lawsuit was filed. In these circumstances, the question becomes whether the arbitration board's interpretation of the labor agreements must be given binding effect in the state court's consideration of the state law claim. The West Virginia Supreme Court of Appeals said no, treating the arbitration award as irrelevant to the HRA claim. That was the court's error. Specifically, the court's statement of what constituted actionable age discrimination—the Railroad's *decision* to put respondents too low on the conductor seniority roster—directly conflicts with the arbitration board's interpretation of the provision in the 1954 agreement governing the assignment of seniority to employees who become conductors. In substance, the West Virginia court promoted the state HRA claim to primacy over the RLA's mandatory arbitration process, in derogation of the requirements of the Supremacy Clause.

The rationale for preempting a state law claim when its resolution depends on interpreting a labor agreement compels deference to the outcome of the arbitration process in a subsequent state action. *Lingle* and *Hawaiian Airlines* teach that a state law claim that depends on an unresolved issue of contract interpretation cannot go forward, because the parties

must obtain resolution of their contract dispute exclusively in arbitration. It follows that if the parties have already completed the arbitration process, a state court must give binding effect to the interpretation of the collective bargaining agreement in the arbitration award in considering the state law claim, and is barred from upholding a state claim that conflicts with the arbitrator's interpretation of the rights and obligations of the parties. There would be no justification for depriving a state court of power to adjudicate a state claim in order to permit arbitration to occur, if the state court were later free to uphold a state law claim that contradicts what the arbitrator has determined the labor agreement means.

Our case is a paradigm. Had the Railroad and respondents' labor union not already arbitrated the meaning of the 1954 agreement, *Hawaiian Airlines* would compel the conclusion that, if respondents contested the Railroad's explanation for placing them on the bottom of the conductor roster by arguing that the 1954 agreement did not cover trainmen who had been forced to become conductors, the state proceeding could not have gone forward. Because resolution of the claim would depend on interpreting the 1954 labor agreement, the parties would have had to proceed to arbitration to obtain the necessary interpretation.

But in the actual case, there was no unresolved issue of contract interpretation in need of arbitration at the time of the state court lawsuit. The parties had already been to arbitration, and the arbitration board had interpreted the contract. The board ruled that the Railroad had the right to promote respondents to conductor; that the 1954 agreement applied to respondents even though they had been forced to become conductors; and that the 1954 agreement required placement of respondents at the bottom of the roster, and nowhere else.

Rather than recognize the binding effect of the arbitration board's authoritative interpretation of the labor agreement, the Supreme Court of Appeals ruled it was correct for the

jury to proceed as though the arbitration award was of no special significance. The court concluded that the Railroad could be found to have committed intentional age discrimination by putting respondents at the bottom of the conductor roster rather than choosing some other (unspecified) placement that was supposedly available to the Railroad and would not have been discriminatory. That conclusion is in direct defiance of the arbitration board's authoritative holding that the 1954 agreement controlled the question of seniority placement for respondents and that the Railroad had only one option under the labor agreement. The court's ruling therefore operates to usurp a function that Congress has assigned exclusively to the arbitrator. By failing to respect the arbitration award and the Railroad's obligation under the RLA to adhere to its labor agreements, 45 U.S.C. §152 First, the West Virginia court threw itself into headlong conflict with *Hawaiian Airlines*, *Lingle*, and the many cases of this Court holding that arbitration boards have exclusive jurisdiction to resolve disputes over the meaning of railroad labor agreements.

The West Virginia court also put itself in conflict with the decision of the Fifth Circuit in *Owens*. That case directly supports the conclusion that the award of Public Law Board No. 4721 must be given preclusive effect. In *Owens*, the district court held that the plaintiff had been denied his right to receive retroactive seniority (*i.e.*, seniority from the date he entered his craft training program rather than the subsequent date on which he entered the craft) because of his race in violation of Title VII. The district court, however, had ignored the fact that the plaintiff had already pursued his right to retroactive seniority under his labor agreement in arbitration, and had lost. 857 F.2d at 264. The Fifth Circuit explained that "under the *Steelworkers Trilogy*, the arbitral decision is final and binding to the extent it resolves questions of contractual rights. The employee may assert his independent statutory rights under Title VII, but the arbitra-

tor's interpretation of the contract status of the parties is controlling." 857 F.2d at 265 (citations omitted). The arbitrator had authoritatively determined that "the collective bargaining agreement controlled seniority, and its provisions did not include any provision for retroactive seniority." *Id.* That ruling was binding in the Title VII action and precluded a finding that the employer had discriminated against the plaintiff by not vesting him with retroactive seniority. *See also Becton v. Detroit Terminal of Consolidated Freightways*, 687 F.2d 140, 142 (6th Cir. 1982) ("court should defer to the arbitrator's construction of the contract" in action under 42 U.S.C. §1981).

The consequence of giving binding effect to the arbitrator's interpretation of the labor agreement is to circumscribe the fact finding that is open to the state court in the course of resolving the state law claim. This is demanded by the Supremacy Clause; a state law's application is nullified to the extent that it is preempted by a federal statute. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). In the context of an unresolved contract dispute, the state process cannot proceed at all, so that the federal arbitration process may be protected. In a case like ours, the state court action may proceed, but the arbitrator's determination of matters within his exclusive jurisdiction precludes a contradictory ruling on those matters by the state court. It makes no difference that the state court does not purport directly to interpret the meaning of a labor agreement, but merely allows the jury to make a determination that would be inconsistent with the arbitration award. What counts is that the court's ruling conflicts with the arbitrator's exercise of his jurisdiction. *See Owens*, 857 F.2d at 264-65 (same result under Title VII). This is analogous to the familiar rule that the Supremacy Clause forbids a state court, in the course of a state proceeding, from entering a ruling that has the effect of contradicting a federal administrative agency's determinations on matters within the agency's exclusive jurisdiction.

See, e.g., Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962-70 (1986) (discussing principles).

In our case, the result of affording the arbitration board's award binding effect is to bar respondents' age discrimination claim entirely. Seniority is a product of labor agreements. *See, e.g., Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968) (en banc). Because the arbitration board's determination of the "contract status of the parties," *Owens*, 857 F.2d at 275, is coextensive with the only purported act of age discrimination by NSR found by the West Virginia Supreme Court of Appeals, the state claim is precluded. This result is not made incorrect by the fact that, in other contexts, giving binding effect to an arbitrator's interpretation of the meaning of a labor agreement may not preclude the state law claim altogether if the resolution of the parties' contract status does not overlap completely with the acts claimed to violate state law. *See Owens*, 857 F.2d at 266; *Becton*, 687 F.2d at 142-43.

3. The Supreme Court of Appeals of West Virginia concluded that *Gardner-Denver* controls our case, interpreting that decision as holding that a labor arbitration award can have no preclusive effect in a statutory discrimination action. App. 18a. But the novel federal issue presented here was not addressed in *Gardner-Denver* and its successors,[11] and has not been resolved by this Court.[12]

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[11] *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984).

[12] Our case is likewise not concerned with the question whether a union may waive an employee's right to litigate claims under antidiscrimination statutes in a judicial forum by entering into a labor agreement that provides for arbitration of such statutory claims. *See Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998).

Gardner-Denver considered whether a labor arbitration award has preclusive effect when there are parallel but independent contractual and statutory remedies. This Court said no, holding that the unsuccessful arbitration of a grievance under a nondiscrimination clause in a labor agreement did not bar the bringing of a subsequent Title VII claim on the same facts, even though this meant the facts would be analyzed anew a second time. The *Gardner-Denver* Court contemplated that an arbitrator and court might reach conflicting assessments of purely factual questions (*e.g.*, discriminatory intent) that are *not* dependent on interpretation of the labor agreement. This parallelism would not offend the structure of federal labor relations because each decisionmaker would be acting within its separate jurisdictional sphere: the arbitrator would be construing whether the employer had abridged the contractual prohibition against discrimination, while the court would be determining whether the employer had violated the separate Title VII prohibition against discrimination. Because the contractual and statutory claims were independent of each other, *Gardner-Denver* presented no issue respecting—and certainly did not condone—a court's intruding into a labor arbitrator's jurisdictional realm through allowance of a statutory claim that conflicts with an arbitrator's interpretation of the labor agreement.[13]

Here, by contrast, respondents' HRA claim is not independent of the meaning of the 1954 agreement "in the sense of 'independent' that matters," *Lingle*, 486 U.S. at 407, because the state claim upheld by the Supreme Court of Appeals *does* conflict with the authoritative interpretation of

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[13] *Gardner-Denver* indicates that a court may accord the arbitrator's decision on whether there was discrimination such weight as the court considers appropriate in the circumstances of the case before it. 415 U.S. at 60 n.21. That is a very different question from whether the court must give binding effect to the arbitrator's interpretation of the meaning of the labor agreement.

the labor agreement obtained by the parties in RLA arbitration. *Gardner-Denver* does not cover this circumstance.

This Court's decision in *Barrentine* appreciates this critical distinction, as do the federal courts of appeals. In *Barrentine*, the Court held, following *Gardner-Denver*, that the petitioners' claims under the Fair Labor Standards Act were not barred by their earlier, unsuccessful arbitration of grievances under their labor agreement. 450 U.S. at 737-45. In so holding, however, the Court noted that the FLSA contains several provisions excepting an employer from obligations that would otherwise apply, when the employer is party to a collective bargaining agreement that contains certain terms. The *Barrentine* Court went on to say that when an employee's FLSA claim "depends on application of one of these exceptions, we assume without deciding that a court should defer to a prior arbitral decision construing the relevant provisions of the collective bargaining agreement." 450 U.S. at 741 n.19. *See also Vadino v. A. Valey Engineers*, 903 F.2d 253 (3d Cir. 1990);[14] *Owens*, 857 F.2d at 265; *Becton*, 687 F.2d at 141-42.

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[14] In *Vadino*, the Third Circuit, finding support in the *Barrentine* footnote, held that, when resolution of a claim under the FLSA depends on interpretation of a labor agreement, the contract issue must be decided in arbitration pursuant to the procedures contemplated by the LMRA. The plaintiff could bring an FLSA claim, but that claim "would be dependent upon the resolution" of the contract interpretation issue. 903 F.2d at 266. *Vadino* did not involve one of the FLSA's enumerated statutory exceptions. Rather, the plaintiff claimed that his employer had violated FLSA by not paying him one and one-half times his regular rate of pay for hours worked in excess of forty. In fact, the employer admittedly did pay plaintiff one and one-half times his actual wage rate. Plaintiff, however, claimed that under his labor agreement he should have been paid at a higher wage rate and that the employer violated FLSA by not paying him one and one-half times *that* rate.

4. The decision of the West Virginia Supreme Court of Appeals should be reviewed and reversed. The decision is a direct assault on the "ordering and adjusting of competing interests through a process of free and voluntary collective bargaining [that] is the keystone of the federal scheme to promote industrial peace." *Lucas Flour*, 369 U.S. at 104.

The Railroad was found liable under state law because it adhered to the obligations imposed on it by a collective bargaining agreement that was not challenged as discriminatory and was not claimed to have been applied unevenly. The consequences flowing from the rule adopted in this case could be devastating. Nearly everything that railroads do with respect to their unionized employees is subject to labor agreements and the collective bargaining process: training, promoting, transferring and compensating employees; assigning work; abolishing jobs; laying employees off. The duty to "make and maintain" these labor agreements, 45 U.S.C. §152 First, is the "heart" of the RLA. *Chicago & North Western Ry. v. United Transportation Union*, 402 U.S. 570, 574 (1971).

If the arbitration board's determination of the Railroad's contractual obligations in assigning conductor seniority was irrelevant to the HRA claim in this case, then it would be equally irrelevant, in the next case, that the labor agreement requires promotion in seniority order, or layoff in reverse seniority order. An employee who had been found in arbitration not to be senior enough to obtain a promotion or to retain a current job could then bring suit, saying he had been discriminated against on the basis of some protected trait. The West Virginia court's decision holds out the prospect

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Resolution of the FLSA claim therefore depended on deciding what wage the plaintiff was entitled to receive under the terms of his labor agreement—a matter that had to be resolved through the grievance arbitration process. *Id.* at 264-66.

that, despite the arbitrator's authoritative determination that the employee was treated exactly as the labor agreement required, every such employment action would become subject to *de novo* testing by a state court jury as to whether the railroad's failure to depart from the requirements of its labor agreement nonetheless created liability under state law—even though there was no suggestion that the labor agreement was discriminatory or had been applied disparately. It is difficult to imagine a state law regime more corrosive of the stable and peaceable resolution of labor-management disputes, or one that strikes more deeply at "the very core of federal labor policy." *Lucas Flour*, 369 U.S. at 104.

This Court should reaffirm the finality of the exclusive arbitration mechanism established in the RLA for resolving disputes over the meaning of labor agreements. The Court should announce definitively that RLA arbitration awards are final and binding and must be given preclusive effect in the areas they cover, and that such awards preclude a state court from allowing state law claims that conflict with the arbitrator's interpretation of the labor agreement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 2000

APPENDICES

APPENDIX A

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1999 Term

No. 26004

JOE BAILEY, ET AL.,
Plaintiffs Below, Appellees

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant Below, Appellant

AND

EDDIE S. CALDWELL, ET AL.,
Plaintiffs Below, Appellees

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant Below, Appellant

Appeal from the Circuit Court of McDowell County
Honorable W. Kendrick King, Judge
Civil Action Nos. 93-C-441-K and 94-C-39-K

AFFIRMED

Submitted: October 19, 1999
Filed: December 15, 1999

JUSTICE McGRAW delivered the Opinion of the Court.
JUSTICE SCOTT did not participate in the decision in this case.
JUDGE JOHN S. HRKO, sitting by temporary assignment.
JUSTICE DAVIS and JUSTICE MAYNARD concur in part, dissent in part, and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Syl. Pt. 5, *Orr v. Crowder,* 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied,* 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).

2. "In reviewing a trial court's granting of a motion for judgment notwithstanding the verdict, it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on the granting of a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the nonmoving party. If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of the appellate court to reverse the circuit court and to order judgment for the appellant." Syl. Pt. 2, *Alkire v. First Nat'l Bank of Parsons,* 197 W.Va. 122, 475 S.E.2d 122 (1996).

3. "An application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1947) (1994 ed.), only if such application requires the

interpretation of a collective-bargaining agreement." Syl. Pt. 4, *Greenfield v. Schmidt Baking Co., Inc.*, 199 W.Va. 447, 485 S.E.2d 391 (1997).

4. "A determination of pre-emption under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1947) (1994 ed.), requires a fact specific analysis." Syl. Pt. 5, *Greenfield v. Schmidt Baking Co. Inc.*, 199 W.Va. 447, 485 S.E.2d 391 (1997).

5. "'The mere fact that W.Va. Code, 21-5-4, relates to matters which may be the subject of collective bargaining does not mean that the terms of this statute are preempted by virtue of Section 301 of the [Labor Management Relations Act], 29 U.S.C. § 185 (1947).' Syllabus Point 5, *Lowe v. Imperial Colliery Co.*, 180 W.Va. 518, 377 S.E.2d 652 (1988)." Syl. Pt. 4, *Ash v. Ravens Metal Prod., Inc.*, 190 W. Va. 90, 437 S.E.2d 254 (1993).

6. "An arbitration clause of a collective bargaining agreement cannot nullify the statutory rights given to employees under the West Virginia Wage Payment and Collection Act, W.Va.Code, 21-5-1, *et seq.*" Syl. Pt. 5, *Ash v. Ravens Metal Products, Inc.*, 190 W. Va. 90, 437 S.E.2d 254 (1993).

7. "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syl. Pt. 3, *Walker v. Monongahela Power Co.* 147 W.Va. 825, 131 S.E.2d 736 (1963).

8. "'When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions,

the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.' Point 4, Syllabus, *Laslo v. Griffith,* 143 W.Va. 469, 102 S.E.2d 894." Syl. Pt. 2, *Walker v. Monongahela Power Co.* 147 W.Va. 825, 131 S.E.2d 736 (1963).

9. """A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder,* 64 W.Va. 659, 63 S.E. 385 (1908).' Syl. Pt. 1, *State ex rel. Simpkins v. Harvey,* [172] W.Va. [312], 305 S.E.2d 268 (1983)." Syl. Pt. 3, *Shell v. Bechtold,* 175 W.Va. 792, 338 S.E.2d 393 (1985).

10. Collateral victims of discrimination are entitled to relief under West Virginia Code § 5-11-9(7) (1999) upon establishing that the employer has engaged in an unlawful discriminatory practice, such as activities designed to cause economic loss. Such collateral victims are properly included as Plaintiffs in a cause of action initiated by other victims of discrimination under the West Virginia Human Rights Act.

11. "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed in a question of law, and the review is *de novo.*" Syl. Pt. 1, *State v. Hinkle,* 200 W.Va. 280, 489 S.E.2d 257 (1996).

12. "A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence.

Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." Syl. Pt. 4, *State v. Guthrie,* 194 W. Va. 657, 461 S.E.2d 163 (1995).

12. "The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syl. Pt. 6, *Tennant v. Marion Health Care Found., Inc.,* 1994 W.Va. 97, 459 S.E.2d 374 (1995).

McGraw, Justice:

This is an appeal by Norfolk and Western Railway Company (hereinafter "the Railroad" or "Appellant")[1] from a jury verdict in the Circuit Court of McDowell County finding that the Railroad had discriminated against sixty-seven employees upon the basis of age when it promoted those employees from brakemen to conductor and placed them at the bottom of the conductors' seniority roster. On appeal, the Railroad maintains that there was insufficient evidence to prove age discrimination and that the jury verdict should be overturned. We disagree and affirm the decision of the lower court.

I.

FACTS

The two cases presently consolidated for review in this Court originated in the lower court and were subsequently removed by the Railroad to the United States District Court for the Southern District of West Virginia. The Railroad sought a ruling in federal court permitting removal and dismissing the action based upon federal preemption by the Railway Labor Act, 45 U.S.C. § 151-188 (1990). The District Court determined that it lacked jurisdiction and remanded the cases to state court, reasoning as follows: "If Plaintiffs' assertions in their Complaint are well-founded, this right [under the West Virginia Human Rights Act] exists separate and apart from any collective bargaining agreement between the defendant and the

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[1] The Appellant, Norfolk and Western Railway Company, was the corporate predecessor of Norfolk Southern Railway Company. When the events which form the basis for this cause of action occurred, Norfolk and Western was a separate Railroad, whose parent company was Norfolk Southern. In September 1998, Norfolk and Western was merged into Norfolk Southern and no longer exists as a separate corporate entity.

Plaintiffs' union. *Bailey v. Norfolk and Western Railway Co.*, 842 F.Supp. 218, 223 (S.D.W. Va. 1994).

Upon remand from federal court to the Circuit Court of McDowell County, the two cases were consolidated and issues of liability and damages were bifurcated for trial. Fifty-two Plaintiffs filed their actions within the *Bailey* lawsuit, and the additional fifteen filed identical claims in the *Caldwell* suit. Forty-one Plaintiffs are currently active employees of the Railroad; the remaining twenty-six have retired, resigned or have become disabled. Five of the Plaintiffs in this action were under forty years of age at the time of their alleged discriminatory placement, effective April 1, 1992. Although the Plaintiffs claim that they were targeted based upon their association with the protected group, the Railroad contends that the lower court erred by allowing the verdict to stand as to these five Plaintiffs.

The essence of the Plaintiffs' complaint is that the Railroad implemented its policies and procedures in such manner as to discriminate against "a large class of older and age-protected workers, who had far greater trainmen seniority than workers hired after November 1, 1985...." These workers were "placed on the bottom of the conductor list...." The Plaintiffs alleged that this action by the Railroad violated West Virginia Code § 5-11-9 (1) (1999), the West Virginia Human Rights Act, providing in pertinent part as follows:

> It shall be an unlawful discriminatory practice ... [f]or any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or disabled: Provided, That it shall not be an unlawful discriminatory practice for an employer to observe the

> provisions of any bona fide pension, retirement, group or employee insurance or welfare benefit plan or system not adopted as a subterfuge to evade the provisions of this subdivision[.]

The Plaintiffs allege that the Railroad engaged in a purposeful venture to eliminate workers who maintained expensive benefit packages earned and vested by employees hired before November 1, 1985, in favor of a class of workers whose membership is comprised of workers predominantly younger than the Plaintiffs and whose benefit packages are less expensive for the Railroad. The Plaintiffs' rights, they contend, are grounded in state law and do not present a federal question involving violations of collective bargaining agreements.

The Plaintiffs presented evidence at trial indicating an extensive, intentional campaign by the Railroad during the early 1980's designed to reduce the workforce and directed primarily at the older workers who enjoyed the expensive benefit packages.[2] The alleged targets of this strategy were brakemen who had the right under collective bargaining agreements to refuse promotion to conductor, thereby retaining their seniority rights and benefits packages as brakemen.

Through a collective bargaining agreement dated October 1, 1985, the Railroad achieved the right to force-promote all employees hired after November 1, 1985, from brakemen to conductor.[3] Under the terms of a 1988 labor agreement

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[2] The benefit packages apparently included significant monetary benefits, higher salaries, and job security rights based upon years of service and seniority within the brakemen category.

[3] This agreement provided that trainmen who established seniority prior to November 1, 1985, including the Plaintiffs in this case, would be governed by existing rules respecting promotion to conductor. The agreement further provided that those establishing seniority on or after November 1, 1985, must accept promotion to conductor. These new hirees

negotiated to govern conductor seniority for post-1985 employees, a post-1985 employee's conductor seniority was to be established by reference to his ranking on the brakemen roster, thereby allowing him to effectively transfer his brakemen seniority to the conductor roster. The 1988 collective bargaining agreement did not address the conductor seniority rights of the pre-1985 employees since they had not yet been subjected to force-promotion.

Subsequent to achieving the right to force-promote the post-1985 employees, the new target of the Railroad's elimination policies, according to the Plaintiffs, became the senior brakemen hired prior to November 1, 1985, who still possessed the right to refuse promotion to conductor. This group allegedly consisted of approximately 130 brakemen on the Pocahontas Division of the Railroad, 87 percent of whom were over the age of forty.

In a new round of national bargaining beginning in 1988, the Railroad sought to achieve the right to force-promote the pre-1985 employees to conductor. Subsequent to two years of unsuccessful bargaining, the President of the United States created Presidential Emergency Board No. 219 (hereinafter "PEB 219") to investigate the unresolved disputes.[4] In 1991, PEB 219 acceded to the Railroad's position and awarded carriers the right to force-promote the brakemen to conductor. By report dated January 15, 1991, the PEB stated that "[i]t is the Board's view, and it so recommends, that all brakemen who

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were promoted after 300 working days to the rank of conductor and could not relinquish or forego their conductor rights or refuse promotion.

[4] Under the Railway Labor Act, 45 U.S.C. §§ 155-56, Railroads and unions periodically engage in negotiations to modify labor agreements, and if no agreement is reached, the President of the United States may appoint a Presidential Emergency Board to investigate and report on the dispute and recommend a solution.

are offered promotion to conductor should be required to accept such promotion."

In response to the PEB decision, the United Transportation Union (hereinafter "UTU") and seven other unions initiated a nationwide rail strike. Congress intervened by enacting Public Law No. 102-29, 105 Stat. 69 (1991) which made the report of PEB 219 binding on the Railroads and unions except as might be clarified or modified by a "Special Board" established by the statute. During these Special Board proceedings, the UTU argued that the force-promotion would result in inequitable placement of senior brakemen at the bottom of the conductor seniority roster, below employees who were more junior as brakemen but who were already conductors. The Railroads responded by assuring the UTU that if "UTU wants brakemen seniority dates to be used for purposes of conductors' seniority, the carriers have no objection; the matter can be resolved when implementing language is adopted." Based upon those proceedings, the Special Board thereafter found PEB 219 to be "fair and demonstrably equitable." Accordingly, on July 29, 1991, PEB 219 became binding on the UTU and the Railroads. The implementing agreement did not impose a national rule for the placement of employees onto the conductor seniority roster, but instead stated that existing rules will "continue in effect."

The Railroad thereafter informed the Plaintiffs and other pre-1985 employees that they would be forced to work under the conductor label and would be placed on the bottom of the conductor seniority roster, effectively stripping them of the seniority they had accrued in years of work as brakemen and placing them on the roster below employees with less overall seniority. The older brakemen would be force-promoted and

placed upon the conductor roster as of the date they became conductors.[5] As explained above, the workers hired after November 1, 1985, were placed upon the conductor roster as of their date of hire with the Railroad, thereby permitting them to use their brakemen seniority. Thus, the Plaintiffs alleged that the Railroad created two separate classes of workers to be force-promoted to conductor, treating those hired after November 1, 1985, substantially differently and in a discriminatory fashion based upon their age.

According to the Plaintiffs, the Railroad sought consensus from the Plaintiffs' union, the UTU, regarding the placement of the pre-1985 hirees at the bottom of the conductor seniority roster. The Plaintiffs acknowledge that many of the UTU Division Chairmen signed letters accepting the Railroad's placement decision, including Division Chairmen from Knoxville, Tennessee;[6] Macon, Georgia; Danville, Kentucky; and Norfolk, Virginia. The UTU Division Chairman from the Plaintiffs' division, however, refused to sign the letter and refused to consent to the placement of these pre-1985 workers at the bottom of the conductor roster.[7]

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[5] The Railroad placed the pre-1985 employees on the conductor seniority roster with a seniority date of April 1, 1992, and they are presently ranked ahead of everyone who became a conductor after April 1, 1992. They are ranked behind employees hired as trainmen after November 1, 1985, and promoted to conductor prior to April 1, 1992.

[6] The Plaintiffs' brief indicated Knoxville, Kentucky, which this Court assumes was a typographical error.

[7] The affected men from the Pocahontas Division thereafter filed a grievance seeking to invalidate the Railroads' choice of placement. The arbitration board did not have before it any allegation of age discrimination and ultimately ruled that it could not invalidate the placement practice based on contractual claims. The board did express that if it possessed the "power of equity," the decision would be different.

In addition to the circumstances surrounding the collective bargaining, the Plaintiffs emphasize other circumstantial evidence of age discrimination. For instance, the Railroad offered a "separation proposal" to the older employees immediately after obtaining the right to force-promote them out of their brakemen positions. The Plaintiffs emphasize the irony of this development to the extent that these workers to whom the separation proposal was offered were the very men the Railroad alleged that it so desperately needed to promote to conductors.

The Plaintiffs also introduced evidence indicating that Railroad supervisors harassed the older workers, made derogatory comments toward them, and made statements expressing animus based upon the age of the workers. These comments allegedly insinuated that the Railroad was eager to remove these older workers from their positions, that "monkeys" would do the job better than these men, and that they had been "screwed" on their job roster seniority placements. The Plaintiffs also introduced evidence indicating that some Railroad supervisory personnel regarded these pre-1985 workers as "high cost" and admitted at trial that the Railroad would be better off without them.

The Railroad submitted evidence at trial defending the discrimination claim by asserting that its placement decisions were founded exclusively upon collective bargaining agreements mandating certain procedures. In promoting the Plaintiffs and placing them at the bottom of the conductor seniority roster, the Railroad maintains that it was simply complying with existing labor agreements with the Plaintiffs' union and exercising authority granted by PEB 219 in 1991, as previously discussed. The Railroad contends that placement is governed by a September 4, 1954, labor agreement requiring the Railroad to place the Plaintiffs at the bottom of the conductor seniority roster. That 1954 agreement indicated that

the rights of conductors would commence on the day they passed the required conductor examinations.[8]

The Railroad further maintained that no Railroad supervisor in any position of authority made harassing comments directed toward workers based upon their age. Any negative comments that were uttered, the Railroad contends, were directed toward the seniority rights and benefit packages the older men enjoyed and were not based upon the age of the workers.

In essences, the Plaintiffs' theory of the case, as argued at trial, was that the Railroad sought refuge in the collective bargaining agreements as justification for outright age discrimination. The Railroad contended that the Plaintiffs engaged in subterfuge in their attempt to parlay a collective bargaining decision into a discrimination claim and that the discrimination claim is totally meritless.

When submitted to a jury on February 26, 1997, the jury returned a verdict in favor of the Plaintiffs on the issue of liability. The damages potion of the trial has been stayed pending this Court's ruling in this appeal of the liability issue. In jury interrogatories, the jury answered yes to the question regarding whether "an illicit bias against employees forty years of age and older was a motivating factor" in the Railroad's "decision to place Plaintiffs at the bottom of the conductor roster." The jury also indicated that it found that the Railroad

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[8] Article 26 of the 1954 agreement provided in pertinent part as follows:

> 1. (a) Conductors will be considered in line of promotion in accordance with seniority, ability and fitness....
>
> (c) The rights of conductors will commence on the day they pass the required examinations, except when older men are absent. Extra trips in emergencies by men who have not been examined will not be counted.

had intentionally discriminated against the Plaintiffs on the basis of age. The jury further reported that it found that the Railroad would not have placed the Plaintiffs at the bottom of the conductor roster absent the impermissible age motivation.

On May 4, 1998, the lower court denied the Railroad's motion for judgment notwithstanding the verdict or in the alternative, a new trial. The Railroad thereafter appealed to this Court. The Railroad maintains that no reasonable jury could have found for the Plaintiffs and that instructions given to the jury created confusion, prejudicing the Railroad and ultimately leading to an invalid verdict.

II.

STANDARD OF REVIEW

"We review questions of law arising from the proceeding below de novo. We view the evidence, and the evidentiary and inferential determinations that were within the province of the jury, in the light most favorable to the party who prevailed--in this case, the plaintiff." *Haynes v. Rhone-Poulenc, Inc.*, ____ W.Va. ____, ____, ____ S.E.2d ____, ____ (No. 25366, July 14, 1999). Upon our review of the jury's conclusions, we must determine whether there was sufficient evidence to permit a reasonable juror to find that the Railroad intentionally discriminated against these Plaintiffs based upon their age. In syllabus point five of *Orr v. Crowder,* 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied,* 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984), this Court stated:

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing

> party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Further, regarding the lower court's decision to deny the Railroad's motion for judgment notwithstanding the verdict, we stated as follows in syllabus point two of *Alkire v. First National Bank of Parsons,* 197 W.Va. 122, 475 S.E.2d 122 (1996):

> In reviewing a trial court's granting of a motion for judgment notwithstanding the verdict, it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on the granting of a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the nonmoving party. If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of the appellate court to reverse the circuit court and to order judgment for the appellant.

III.

DISCUSSION

A. *Interplay Between Collective Bargaining Agreements and State Discrimination Law*

As a preliminary and fundamental matter, this Court acknowledges that resolution of this case does not depend upon any assessment of the appropriateness of collective bargaining agreements between the Plaintiffs' union and the Railroad. In *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985), the United

States Supreme Court explained: "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between parties in a labor contract, that claim must either be treated as a § 301 claim[9] ... or dismissed as pre-empted by federal labor-contract law." 471 U.S. at 220 (citations omitted). The Supreme Court also noted, however, that not all labor disputes are pre-empted by Section 301:

> Clearly § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

471 U.S. at 212.

The Supreme Court specified that it expressly did *not* hold

> that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301. The full scope of the pre-emptive effect of federal labor-

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[9] Section 301(a) of the Labor Management Relations Act [hereinafter § 301] provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. 185(a) (1947) (1994 ed.).

> contract law remains to be fleshed out on a case-by-case basis.

Id. at 220.

With specific reference to the Railway Labor Act, the United States Supreme Court has expressed the identical sentiment: "substantive protections provided by state law, independent of whatever labor agreements might govern, are not preempted under the [Railway Labor Act.]" *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 257 (1994). The Court reasoned that "no proposed interpretation demonstrates a clear and manifest congressional purpose to create a regime that broadly pre-empts substantive protections extended by the States, independent of any negotiated labor agreement." *Id.* at 255-56.

Where an employer raised a defense which allegedly required some interpretation of a collective bargaining agreement, the Supreme Court in *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987), explained that § 301 did not preempt state consideration of the claim.

> [T]he presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule--that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.... [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated.

482 at 398-99.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the United States Supreme Court encountered a plaintiff who had submitted his discrimination claim to arbitration through a collective bargaining agreement. The Court determined that the plaintiff had not foreclosed his rights to pursue his discrimination claim under Title VII of the Civil Rights Act of 1964 and reasoned as follows:

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

415 U.S. at 51-52 (citations omitted).

In this Court's recent examination of these issues in *Greenfield v. Schmidt Baking Co.*, 199 W.Va. 447, 485 S.E.2d 391 (1997), we stated as follows at syllabus point four: "An application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1947) (1994 ed.), only if such application requires the interpretation of a collective-bargaining agreement." Based upon extensive evaluation of federal preemption law, we also explained at syllabus point five of *Greenfield*: "A determination of pre-emption under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1947) (1994 ed.), requires a fact specific analysis."[10]

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[10] *See* Syl. Pt. 1, *Chapple v. Fairmont Gen. Hosp., Inc.*, 181 W.Va. 755, 384 S.E.2d 366 (1989) ("Although state and federal courts have concurrent jurisdiction in actions involving an alleged breach of a collective bargaining agreement, the substantive law to be applied in suits

With reference to the West Virginia Wage Payment and Collection Act, we concluded in syllabus point four of *Ash v. Ravens Metal Products, Inc.*, 190 W.Va. 90, 437 S.E.2d 254 (1993), that "'[t]he mere fact that W.Va.Code, 21-5-4, relates to matters which may be the subject of collective bargaining does not mean that the terms of this statute are preempted by virtue of Section 301 of the [Labor Management Relations Act], 29 U.S.C. § 185 (1947).' Syllabus Point 5, *Lowe v. Imperial Colliery Co.*, 180 W.Va. 518, 377 S.E.2d 652 (1988)." In syllabus point five of *Ash*, we continued in that vein: "An arbitration clause of a collective bargaining agreement cannot nullify the statutory rights given to employees under the West Virginia Wage Payment and Collection Act, W.Va.Code, 21-5-1, *et seq.*"

In *Yoho v. Triangle PWC, Inc.*, 175 W.Va. 556, 336 S.E.2d 204 (1985), an employee instituted an action under West Virginia law against her employer and union for retaliatory discharge allegedly based upon her receipt of workers' compensation benefits. Her discharge after a one-year absence from work was consistent with the terms of a collective bargaining agreement; thus, her challenge was determined to have its foundations in state law rather then any violation of collective bargaining agreements. We therefore found that her action was not preempted by the Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185, governing suits by and against labor organizations for contract violations. *Id.* at 560, 336 S.E.2d at 208.

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under § 301(a) of the Labor Management Relations Act is federal law."); Syl. Pt. 4, *Lowe v. Imperial Colliery Co.*, 180 W.Va. 518, 377 S.E.2d 652 (1988) ("While § 301 of the Labor Management Relations Act, 29 U.S.C. Sec. 185 (1947), does not divest state courts of jurisdiction in labor cases, the federal labor law is supreme and is to be applied by state and federal courts alike. State law to the contrary is preempted.").

In the present case, we conclude that our review of this state law discrimination claim is not exclusively dependent upon the terms of the collective bargaining agreements.[11] The Plaintiffs do not directly attack the agreements or allege a violation thereof, but instead allege that the Railroad discriminated against them in a more general effort to remove them from its workforce through any means available to it, including discriminatory application of the collective bargaining agreements, intimidation, and hostile comments directed toward the older workers and based upon the age of those workers.

Thus, this Court's perception of the adequacy of the resolutions made through the existing labor agreements is irrelevant.[12] We concentrate only upon the allegations of discrimination and refrain, as the Railroad cautions, from permitting the Plaintiffs to utilize the West Virginia Human Rights Act to reverse modifications in the Railroad industry developed by collective bargaining agreements or PEB 219.

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[11] The Plaintiffs concede that the Railroad's authority to force-promote the brakemen is not challenged. The Plaintiffs agree that the "workers affected by the PEB plainly have to accept the rights, if offered, and no part of the state-based discrimination claim will alter, infringe upon or change that fact." The Plaintiffs contend, however, that the Railroad's legitimate action in force-promotion does not justify discrimination in the placement on the seniority roster.

[12] We note parenthetically that we have held that the West Virginia Human Rights Act "holds unions responsible for discriminatory terms and conditions in collective bargaining agreements." Syl. Pt. 2, in part, *West Virginia Human Rights Comm'n v. United Transp. Union, Local No. 655* 167 W.Va. 282, 280 S.E.2d 653 (1981).

B.

Discrimination Claim

The Plaintiffs maintain that this is a "mixed motive" case, specifically authorized by the West Virginia Human Rights Act. *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 75, 479 S.E.2d 561, 585 (1996). In such case, an employer may indeed have a legitimate basis for its employment decision, and that legitimate basis may have played a role in the ultimate decision. In such mixed motive action, however, the Plaintiffs need prove only that a forbidden intent was a motivating factor in an employment action. The employer is then liable unless it proves that "the same result would have occurred even in the absence of the unlawful motive." *Id.*

In the mixed motive case, the defendant has allegedly "acted for unlawful as well as lawful reasons, and we have accordingly shifted the burden of persuasion on the issue of causation to the defendant and required it, to avoid liability, to prove that the same decision would have been made in the absence of the unlawful reason." *Barlow v. Hester Indus., Inc,* 198 W.Va. 118, 138, 479 S.E.2d 628, 648 (1996). In *Page v. Columbia Natural Resources, Inc.*, 198 W.Va. 378, 480 S.E.2d 817 (1996), we explained:

> Although we have rejected the circumstantial-direct evidence distinction, we emphasize that the plaintiff does have the burden of proving by a preponderance of the evidence that a forbidden intent was a motivating factor in the adverse employment action. While this is a greater burden than that required under the pretext theory, which is discussed in the next section, we believe it is justified by the fact that, once a plaintiff has met this burden, the burden of persuasion and the risk of nonpersuasion shifts to the defendant.

Id. at 390, 480 S.E.2d at 829.

In *Skaggs,* we explained that the "shift of the risk of nonpersuasion" is justified in the mixed motive case.

> We believe this shift of the risk of nonpersuasion is appropriate. First, in a case where the plaintiff proves that the defendant harbored an unlawful motive, it is only fair that the defendant bear the burden of persuasion in sorting through the difficult issue of causation when the evidence shows there have been multiple contributing factors. In so doing, we merely adopt the well-established approach used in other contexts. Our motivating factor standard specifically rejects any requirement that some additional threshold, such as the substantial factor test, must be met before the burden shifts. Even if we could describe (and we cannot) what a substantial factor means in this context, we would reject it as unwarranted. If the evidence shows that discriminatory motive entered into the decision making to any degree, then the employer engaged in wrongdoing and should bear the burden on causation.

198 W. Va. at 76, 479 S.E.2d at 586.

In *Martin v. Randolph County Board of Education,* 195 W. Va. 297, 465 S.E.2d 399 (1995), a sex discrimination action, we explained that a "plaintiff is not required to show that the defendant's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor ... was at least one of the 'motivating' factors." 195 W. Va. at 310, 465 S.E.2d at 412, citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 247 (1989) (plurality opinion in which the United States Supreme Court held that where an employer has shown a legitimate motive the plaintiff need not show that the prohibited factor was the sole or principal reason, or "the true reason"). In *Martin,* we concluded that where "the plaintiff proves by a preponderance

of the evidence that an illicit motive entered into the challenged employment decision, then the plaintiff wins unless the defendant proves by a preponderance of the evidence that the same result would have occurred even in the absence of the illicit motive." 195 W. Va. at 311-12, 465 S.E.2d at 412-13.[13]

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[13] The mixed motive case burden scheme is a variation of the traditional pretext approach to discrimination cases. As we explained in *Skaggs*,

> a mixed motive case *is* a disparate treatment case. "Mixed motive" refers to cases in which a discriminatory motive combines with some legitimate motive to produce an adverse action against the plaintiff. "Disparate treatment" refers to cases in which a discriminatory motive produces an adverse employment action against the plaintiff. As a technical matter, then, mixed motive cases form a subcategory of disparate treatment cases.

Skaggs, 198 W. Va. at 74, 479 S.E.2d at 584. In the traditional pretext case, pursuant to the United States Supreme Court directive in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a three-step "burden shifting" analysis is utilized to evaluate proof in discrimination cases. The plaintiff first forwards a prima facie case of discrimination by introducing evidence demonstrating that an adverse employment decision was prompted by his employer's contemplation of improper factors such as age. In response, the burden is shifted to the employer, who then must introduce evidence tending to demonstrate that the employment decision was founded upon a legitimate, non-discriminatory reason. Finally, the plaintiff must introduce evidence demonstrating that the employer's proffered reason is a pretext, rather than the actual basis for the adverse employment decision. In syllabus point three of *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983), we explained, in pertinent part:

> If the complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the rejection. Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination.

In addressing the sufficiency of evidence presented in a discrimination claim, we reasoned as follows in *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986):

> Because discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

178 W.Va. at 170-71, 358 S.E.2d at 429-30.

The Railroad directs our attention to *Hiatt v. Union Pacific Railroad,* 65 F.3d 838 (10th Cir. 1995), and alleges that the *Hiatt* decision lends credibility to the Railroad's position in this matter. The *Hiatt* court upheld the entry of summary judgment for the Railroad in a similar case, finding that the Plaintiffs could offer no evidence to refute the Railroad's showing that any "alleged harm to Plaintiffs was caused solely by the interaction of the congressional mandate and the established seniority system" and was therefore not related to age bias. *Id.* at 843. The workers in *Hiatt* had challenged the failure of the Railroad to provide them with special consideration when they

were forced to accept more grueling work. The court summarized the Plaintiffs' allegations as follows:

> This transition from experienced brakeman to junior conductor can be abrupt under the best of circumstances: one loses a great deal of choice over one's work, and must again toil at those duties that no one else desires. Traditionally, the prospect of a second stint of grunt work deterred a significant percentage of qualified brakemen from accepting promotion to conductor, and in fact the majority of the Plaintiffs chose to forego promotion and remain brakemen. Mandatory promotion, within the context of the established seniority system, thus thrust a rather traumatic, and unwanted, mid-life career change upon the Plaintiffs. As brakemen, the Plaintiffs could choose to work whatever runs suited them; as conductors, these same individuals must now take what they can get--at an age when their bodies are less resilient, and their lives more settled, than many younger men who hold greater conductor (but less overall) seniority. Unhappy with their situations, and believing themselves to have suffered because of their ages, the Plaintiffs filed suit under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634.

Id. at 841.

The Plaintiffs in *Hiatt* contended that the Railroad had:

> failed to take measures to mitigate the uniquely deleterious impact of promotion upon the lives of older brakemen. The Plaintiffs assert that the Defendants could have preserved the ability of older brakemen to control their work schedules either by dovetailing brakemen seniority with conductor seniority or by otherwise redistributing the workload

> to spare older brakemen the more arduous tasks. The Plaintiffs claim that the failure of the Defendants to take these (or similar) steps gives rise to both a disparate impact and a disparate treatment claim.

Id.

The *Hiatt* court specifically noted that all the promotees, young and old, were being treated the same under the seniority placement rules. The Plaintiffs in *Hiatt* even admitted that "they were treated no differently under the seniority system than other newly promoted conductors." *Id.* at 842. Thus, the court, "[r]eading the record in the light most favorable to the Plaintiffs," found that "the Plaintiffs have established only that they were inconvenienced by the obligatory promotion to conductor. The Plaintiffs have adduced no evidence to refute the Defendants' contention that the alleged harm to the Plaintiffs was caused solely by the interaction of the congressional mandate and the established seniority system." *Id.* at 843.

The scenario presented in the case sub judice is markedly distinct from *Hiatt.* The *Hiatt* Plaintiffs were not alleging the existence of two distinct groups with different seniority placement rules based upon the age of the workers; the Plaintiffs in the present case are making such allegation. In this case, the Plaintiffs contend that the harm was not exclusively caused by the legitimate collective bargaining agreements, and that the Railroad engaged in discrimination by applying two different standards to guide the seniority roster placement, based upon the discriminatory intent.

In *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985), although a transfer policy was legitimately authorized for pilots, the method of effectuating the policy was alleged to be discriminatory. In its attempt to effectuate a federally-mandated policy of forced retirement of pilots at age sixty, the

employer devised a transfer policy that ultimately discriminated against older workers. The policy allowed pilots to bump less senior workers in other cockpit positions, such as flight engineers, when the reason for leaving the pilot position was due to medical reasons or other disqualifying factors, but would not permit pilots to bump less senior flight engineers when the reason for leaving the pilot position was due to disqualification under the age sixty rule. The United State Supreme Court held that if the airline undertook to establish "bumping rights," it could not do so in a discriminatory fashion. *Id.* at 124.

The Railroad in the present case applied two sets of criteria for establishing seniority rosters for those who were forced to take conductor rights. Under the burden-shifting analysis applicable in a mixed motive case, the burden was ultimately upon the Railroad to prove that the challenged decision would have been made in the absence of an unlawful motive. Thus, the role of the jury became crucial in the resolution of the conflicting evidence.

C.

The Role of the Finder of Fact

In *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), the United States Supreme Court explained:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination....

Id. at 511.

In discussing the jury's role in disparate treatment[14] cases, we noted in *Skaggs* that

> the jury is charged with the duty of recreating what in fact happened and whether the facts that did happen included intentional discrimination. Thus, if the jury reads the facts and concludes that the employee has proved that a discriminatory motive entered into the employer's decision, it should not matter whether that conclusion was induced by direct or circumstantial evidence.

198 W.Va. at 76, 479 S.E.2d at 586 (citations omitted).

This Court's review of the determinations of a jury is defined in syllabus point three of *Walker v. Monongahela Power Co.*, 147 W.Va. 825, 131 S.E.2d 736 (1963). "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syllabus point two of *Walker* also provided us with the following guidance: "'When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.' Point 4, Syllabus, *Laslo v. Griffith,* 143 W.Va. 469, 102 S.E.2d 894."

Pursuant to the standards guiding this Court's review of the jury determination in favor of the Plaintiffs in this case, we must examine the evidence in a light most favorable to the

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[14] The term "'[d]isparate treatment' refers to cases in which a discriminatory motive produces an adverse employment action against the plaintiff." *Skaggs,* 198 W.Va. at 74, 479 S.E.2d at 584. The mixed motive case is a subcategory of disparate treatment claims.

Plaintiffs, assuming that all evidentiary conflicts were resolved in favor of the Plaintiffs and assuming as true all facts tended to be proven by the Plaintiffs' evidence. Syl. Pt. 5, *Orr,* 173 W. Va. at 339, 315 S.E.2d at 597. Having thus considered the evidence, we find that the evidence presented by the Plaintiffs was sufficient to sustain the verdict returned by the jury. We do not believe that the verdict was "plainly contrary to the weight of the evidence or without sufficient evidence to support it." Syl. Pt. 2, *Walker,* 147 W. Va. at 826, 131 S.E.2d at 737.

D.

Alleged Instructional Error

The Railroad alleges that the instructions provided to the jury created confusion regarding the evidentiary requirements of a claim of age discrimination and provided insufficient guidance to the jury on the law and the issues. Plaintiffs' instruction nine, in court-modified version, provided that an individual may be discriminated against even though he is not in an age protected group if he associates with members of the protected group. The instruction further provided that a person younger than forty years old, who is in the same grouping as older workers, may recover for discrimination.

The Railroad maintains that this instruction constitutes an erroneous statement of the law regarding inclusion of workers under forty years of age, and colors the jury view of the case by utilizing the phrase "target" group of "older workers." The Railroad argues that the instruction could be interpreted to imply the existence of a "grouping" of older workers targeted for their age and is therefore misleading.

Our review of the instruction does not lead us to the conclusion that it constituted a misstatement of the applicable law. In discussing age discrimination, West Virginia Code § 5-11-3(k) (1999) defines age to mean "the age of forty or above,"

and the Railroad maintains that the five Plaintiffs under the age of forty should not have been included in the Complaint as a matter of law. The five Plaintiffs claim, however, that they have been properly included as Plaintiffs by operation of either the "continuing violation" doctrine or their association with the protected group.[15] In resolving the matter of inclusion of the five Plaintiffs under age forty, we recognize the necessity for the protection of the Human Rights Act to be extended to individuals who suffer collateral harm from discriminatory practices committed in violation of the Act. In examining the potential relief available to the five Plaintiffs who were under the age of forty at the time the discrimination was initiated in this case, the remedy available through West Virginia Code §5-11-9(7) (1999) is of particular intrigue. That section provides as follows:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the

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[15] As support for their claim of "association," they cite *West Virginia Human Rights Commission v. Wilson Estates, Inc.*, 202 W. Va. 152, 503 S.E.2d 6 (1998), in which this Court addressed the West Virginia Fair Housing Act and held that a cause of action exists for discrimination directed against tenant based on race of those individuals with whom tenant chooses to associate. *Id.* at 203, 503 S.E.2d at 7. *Wilson Estates* involved entitlement to pursue a cause of action under the Fair Housing Act after having associated with African Americans and being discriminated against on the basis of that affiliation. Inclusion as Plaintiffs in [illegible]use of action available only to individuals over the age of forty throu[illegible]he West Virginia Human Rights Act is not a corresponding right, and we therefore reject the contention that the five Plaintiffs under the age of forty at the time of the challenged action are properly included as Plaintiffs.

We also reject the Plaintiffs' contentions that the continuing violation doctrine can be utilized to justify their inclusion as Plaintiffs. The continuing violation doctrine is available as mechanism to toll the statute of limitations and is not appropriate for consideration in this context.

state of West Virginia or its agencies or political subdivisions:

> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to: (A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section.

Pursuant to this section, where the employer engages in activities of any nature, the purpose of which is to cause economic loss, the employer has committed an unlawful discriminatory practice under the Act. Thus, whether entertained as a derivative or an independent claim, individuals who may not otherwise be covered under the specific requirements of the Act can seek relief through the more general provisions of West Virginia Code § 5-11-9(7). In the case sub judice, the five individuals have asserted that they were victims of an unlawful discriminatory practice perpetrated through the Railroad's engagement in discriminatory activities, and we find that relief through section 5-11-9(7) is appropriate. Thus, despite the fact that they had not attained the age of forty at the time of the alleged discriminatory action, they are appropriately considered collateral victims of the discrimination against the members within the protected age group and can be viewed as suffering the same consequences as those within the protected age group.

West Virginia Code § 5-11-15 (1999) provides that the West Virginia Human Rights Act "shall be liberally construed to accomplish its objectives and purposes." *See Williamson v.*

Greene, 200 W.Va. 421, 490 S.E.2d 23 (1997); *Dobson v. Eastern Associated Coal Corp.*, 188 W.Va. 17, 422 S.E.2d 494 (1992); *Casteel v. Consolidation Coal Corp.*, 181 W.Va. 501, 383 S.E.2d 305 (1989). West Virginia Code § 5-11-2 (1989) explains the objectives and purposes of the Human Rights Act, as follows: "It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment.... Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons...." In syllabus point three of *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985), we explained:

> "'A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.' Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)." Syl.Pt. 1, *State ex rel. Simpkins v. Harvey*, [172] W.Va. [312], 305 S.E.2d 268 (1983).

See also Syl. Pt. 7, *State ex rel. Goff v. Merrifield*, 191 W.Va. 473, 446 S.E.2d 695 (1994); Syl. Pt. 1, *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992). We consequently find that the five Plaintiffs under the age of forty at the time of the alleged discriminatory action may recover under the West Virginia Human Rights Act and were properly included by the lower court as Plaintiffs. We hold that collateral victims of discrimination are entitled to relief under W. Va. Code § 5-11-9(7) (1999) upon establishing that the employer has engaged in

an unlawful discriminatory practice, such as activities designed to cause economic loss. Such collateral victims are properly included as Plaintiffs in a cause of action initiated by other victims of discrimination under the West Virginia Human Rights Act.

As we explained in *Skaggs,* "our review of the legal propriety of the trial court's instructions is *de novo.*" 198 W. Va. at 63, 479 S.E.2d at 573, citing *State v. Guthrie,* 194 W.Va. 657, 671, 461 S.E.2d 163, 177 (1995). We explained as follows in syllabus point one of *State v. Hinkle,* 200 W.Va. 280, 489 S.E.2d 257 (1996): "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo.*"

We have expressed our review of challenges to jury instructions, as follows: "To challenge jury instructions successfully, a challenger must first demonstrate the charge as a whole created a substantial and ineradicable doubt about whether the jury was properly guided in its deliberations. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case." *Skaggs,* 198 W. Va. at 70, 479 S.E.2d at 580.

In syllabus point four of *Guthrie,* we stated:

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when

> determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, as long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

194 W. Va. at 663-64, 461 S.E.2d at 169-70.

Regarding the potential confusion created by instruction nine, we are not persuaded that the use of the phrase "grouping of older workers" could have confused the jury. The Plaintiffs' whole case centered upon separation of the Plaintiffs and other workers into two groups, and indeed the Railroad admits that two distinct groups were legitimately created. While the Railroad is disturbed by the characterization of the group as "older," we discern no evidence that the inclusion of such language within the instructions conferred unreasonable credibility to the Plaintiffs' theories of discrimination. Through the presentation of evidence, the jury was aware of two distinct groups, one including new hirees and the other included longstanding employees hired prior to 1985. The use of the term "older workers" was not prejudicial.

The Railroad also contends that defendant's instruction four was improperly modified by the lower court. The Railroad had requested the court to instruct the jury that the Railroad's placement of the Plaintiffs at the bottom of the conductor seniority roster was "required" by the 1954 agreement. The lower court modified the instruction to provide that such placement was "permitted" by the agreement. The Railroad maintains that the instruction as modified conveys the false impression that the Railroad had some hidden agenda or illicit

reason to have placed the Plaintiffs at the bottom of the roster and that the 1954 agreement was not binding.

Once again, we do not find that the jury could have been misled by this instruction. In syllabus point six of *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995), this Court explained:

> The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.

We find no abuse of discretion in the alteration from "required" to "permitted."

The Railroad contends that court instruction C also confused the jury. It provided that the age discrimination claim existed "independently" of collective bargaining agreements and rights under federal law. The Railroad argues that the instruction was confusing since the discrimination claim should have been considered in light of the agreements, not independent thereto. We find no merit to the Railroad's contentions. As we have emphasized, the discrimination claim under the West Virginia Human Rights Act is a separate and distinct claim from any claim the Plaintiffs could have pursued through the collective bargaining agreements. Thus, the lower court's instruction was proper and was not misleading.

The Railroad asserts that court instruction E confused the jury by explaining that the Plaintiffs could not directly or indirectly consent to discrimination, "either individually or through his Union or otherwise." The Railroad contends that there is no factual basis for that instruction since the Plaintiffs

did not challenge the validity of the collective bargaining agreements. While we do view this instruction as somewhat superfluous, we do not find that it created confusion which prejudiced the Railroad. The Railroad had requested and received an instruction informing the jury that the ranking of the Plaintiffs was "taken to comply with a facially neutral collective bargaining agreement and was a lawful nondiscriminatory reason." The Railroad contends that instruction E blunted the effect of other instructions regarding the compliance with the agreements and confused the jury. As we explained above, our review of the instructions, in ascertaining the potential confusion to the jury, must be based upon the instructions as a whole. We do not find that this instruction tainted the jury's view of the case or prejudiced the Railroad.

The Railroad also complains that the lower court improperly refused to give Railroad instructions eight and nine which would have instructed that jury that the placement of the Plaintiffs on the seniority roster was authorized by PEB 219 and was therefore not age discrimination and that reduction in crew sizes was not per se discrimination. The lower court would have been unjustified in instructing the jury that the placement was not age discrimination. Such instructions would have obviated the need for the jury. As discussed above, refusal to give an instruction is reviewed for abuse of discretion. Where the alleged error entails the lower court's refusal to give a requested instruction, this Court on review "will ...presume[] that [the] trial court acted correctly ... unless it appears from the record in the case ... that the instructions refused were correct and should have been given." *Coleman v. Sopher,* 201 W.Va. 588, 602, 499 S.E.2d 592, 606 (1997) (internal quotations and citations omitted). We discern no abuse in the refusal to provide the requested instructions.

The Railroad also contends that the lower court erroneously refused to give Railroad instruction five which would have explained that the jury must decide what motivated the persons making the seniority decision and that stray remarks about age cannot be attributed to anyone other than the speaker of those remarks. The instruction would have informed the jury as follows:

> "[S]tray remarks" about age, if you find there are any, that were made by individuals who were not involved in the decisionmaking process, are not evidence of an illicit motive on the part of [the Railroad].... [V]oluntary buy-out programs--even attractive programs aimed at inducing employees to retire who might otherwise not retire--are not of themselves age discrimination, and are not of themselves evidence of age discrimination.... [T]he Human Rights Act does not prevent an employer from making decisions based on an employee's cost to the company.... [E]mployer action motivated by an interest to avoid the costs or benefits that an employee may enjoy by virtue of his years of service with a company, is not action motivated by an illicit bias against employees because of how old they are.

We see no abuse of discretion in the refusal to give such instruction. The Plaintiffs emphasize that such instruction would have constituted impermissible comment by the lower court on the evidence. West Virginia Rule of Civil Procedure 51 explains that a trial court, "in giving instructions to the jury ... shall not comment upon the evidence." Even if this instruction would not have constituted a "comment" on the evidence and would not have conveyed erroneous information, it would have allowed the court to essentially engage in discourse with the jury which would have been more appropriately addressed by counsel for the Railroad.

The Railroad maintains that the jury was further confused by Plaintiff's instruction one, a respondeat superior instruction, implying that the Railroad was responsible for all remarks made by Railroad personnel, and by court's instruction D which informed the jury that it should consider the "whole package" of terms and conditions of the Plaintiffs' employment. The Plaintiffs contend that the standard respondeat superior instruction was appropriate and did not confuse the jury regarding its role in determining whether the Railroad had engaged in discrimination.[16] The Plaintiffs also assert that since discrimination can be proven by direct or indirect evidence, the "totality of circumstances" phrase was not misleading. We agree and find no that no confusion was created by the instruction.

Upon review of the instructions given to the jury in this case, we find that the jury was properly informed of the intricacies of a discrimination claim and the appropriate standard of proof for both the Railroad and the Plaintiffs. We do not find, as required by *Skaggs* as a prerequisite to a successful challenge to jury instructions, that the "charge as a whole created a substantial and ineradicable doubt about

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[16] We acknowledged in *Paxton v. Crabtree,* 184 W.Va. 237, 400 S.E.2d 245 (1990), that two types of "tests have developed for imposing liability on an employer for discriminatory acts of its employees." 184 W. Va. at 245, 400 S.E.2d at 253.

> If a discriminatory act has been committed by an officer or a supervisory employee, an employer may be held liable without a showing that the employer knew or reasonably should have known of the misconduct, except if the supervisory employee was acting outside the scope of his employment. Second, for the acts of nonsupervisory employees, an employer can be found liable if he knew or reasonably should have known of the discriminatory acts, or expressly or impliedly authorized or ratified them.

Id. (footnote omitted).

whether the jury was properly guided in its deliberations." 198 W. Va. at 70, 479 S.E.2d at 580.

IV.

CONCLUSION

Our review of the record and the arguments of counsel in this matter leads us to the conclusion that the jury verdict was properly supported by the evidence. When faced with the Plaintiffs' evidence of age discrimination, the Railroad submitted a legitimate, nondiscriminatory reason for the challenged action, namely the collective bargaining agreements of 1954 and 1988 and PEB 219. The Railroad contended that it was exclusively the application of those mandates which formed the foundation for its seniority roster placement decisions. The Plaintiffs tried their action on the mixed motive theory; thus, it became the responsibility of the jury to determine whether the same result would have occurred absent an unlawful discriminatory motive. The jury specified in interrogatories that it determined that the Railroad would not have placed the Plaintiffs at the bottom of the conductor seniority roster absent the impermissible age motivation. Viewing the evidence and possible inferential determinations in a light most favorable to the Plaintiffs, we do not find that the jury's verdict was plainly contrary to the weight of the evidence or without sufficient evidence to support it.

Consequently, we affirm the decision of the lower court.

Affirmed.

Davis, J., concurring in part and dissenting in part:

The majority has committed an injustice by indulging itself in the ill-advised self-appointed role of judge and jury. Through its opinion, the majority has miserably failed in its commitment to uphold basic legal standards and has deliberately pummeled fundamental concepts of due process and appellate jurisdiction in this State. Reduced to its analytical essence, this case presented two general issues for resolution by this Court. First, was the judgement valid as to the age discrimination claim brought by the 62 plaintiffs who were 40 years old, or older, at the time of the alleged discrimination? Second, was the judgment valid as to the age discrimination claim brought by the five plaintiffs who were *under* 40 years of age at the time of the alleged discrimination? As to the first question, the majority ruled that the judgment for the 62 plaintiffs was valid. With this conclusion I agree and therefore concur in that part of the majority's opinion. As to the second question, the majority ruled that, under a theory dubbed "collateral victim," the judgment for the five plaintiffs was valid. With this conclusion I disagree and therefore dissent to that portion of the majority's opinion.

The basis of my dissent is that Norfolk and Western Railway Company (hereinafter "Norfolk & Western") was denied state and federal constitutional due process by the majority's decision to create a "new" cause of action under W. Va. Code § 5-11-9(7), and to then *sua sponte* decide that cause of action against Norfolk & Western on appeal.

DENIAL OF DUE PROCESS

Five of the plaintiffs were not 40 years old or older at the time they were allegedly discriminated against because of their age. Yet, those five plaintiffs attempted to invoke a cause of action for age discrimination under our State's Human Rights Act. Under W. Va. Code § 5-11-3(k) of the Human Rights Act,

there is an express legislative requirement that to maintain a cause of action for age discrimination a party must be "forty or above" at the time of the discrimination. These five plaintiffs have attempted go get around the legislatively-imposed age limitation by advancing two alternative theories. They assert their age discrimination cause of action either on the basis of a "continuous tort" or under the "association doctrine."

On appeal the majority opinion rejected both theories proffered by the five plaintiffs. The majority opinion ruled that neither the continuous tort nor the association doctrine were applicable to the plaintiffs' claim. Based upon the historical legal doctrines of this Court and the time-honored precedents of Anglo-American jurisprudence, the majority should have ended its analysis and reversed the judgment as to these five plaintiffs. The parties presented below and argued on appeal *only* the theories of continuous tort and the association doctrine. Thus, based upon settled precedent, the majority was compelled to terminate its analysis. *See Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 585, 490 S.E.2d 657, 672 (1997) ("We frequently have held that issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal to this Court."); Syl. Pt. 2, *Trent v. Cook*, 198 W. Va. 601,482 S.E.2d 218 (1996) ("[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review."); *Barney v. Auvil*, 195 W. Va. 733, 741, 466 S.E.2d 801, 809 (1995) ("Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered."); *Whitlow v. Board of Educ. of Kanawha County*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our general rule in this regard is that, when

nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."); *Michigan Nat'l Bank v. Mattingly*, 158 W. Va. 621, 626, 212 S.E.2d 754, 757-58 (1975) ("[T]his Court will not consider nonjurisdictional questions not acted upon by the trial court."); Syl. Pt. 4, *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 157 W. Va. 93, 199 S.E.2d 308 (1973) ("This Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court."); *Konchesky v. S.J. Groves & Sons Co., Inc.*, 148 W. Va. 411, 414, 135 S.E.2d 299, 302 (1964) ("[I]t has always been necessary for a party to object or except in some manner to the ruling of a trial court, in order to give said court an opportunity to rule on such objection before this Court will consider such matter on appeal.")[1]

The majority *sua sponte* decided in this opinion that it would create a new theory of liability to benefit these five plaintiffs. Embarking on this course, the majority determined that the independent cause of action for economic loss found in W. Va. Code § 5-11-9(7)(A) would partly save the plaintiffs' judgment. However, in order to completely save the judgment, the majority created a unique creature in discrimination law and

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[1] We have explained this limited scope of review thusly:

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we have the benefit of its wisdom.

Whitlow v. Board of Educ. of Kanawha County, 190 W. Va. at 226, 438 S.E.2d at 18.

titled it "collateral victim." In doing so, the majority proclaimed that, while the five plaintiffs did not meet the age discrimination requirement, they were nevertheless collateral victims of age discrimination who suffered economic loss. The majority then concluded that under W. Va. Code § 5-11-9(7)(A) and the collateral victim doctrine, the plaintiffs' judgment should be sustained.[2]

This result obtained in the majority opinion, though, is just plain wrong. The plaintiffs did not even assert W. Va. Code § 5-11-9(7)(A) at the trial level or on appeal. Nor did the plaintiffs present any evidence regarding W. Va. Code § 5-11-9(7)(A) at the trial level or on appeal. Neither did Norfolk and Western present evidence to rebut such a cause of action under W. Va. Code § 5-11-9(7)(A) at the trial level or on appeal. Presumably, such evidence is lacking because none of the

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[2] Let me be clear here, because the majority decision is very unclear. The majority has invoked W. Va. Code § 5-11-9(7)(A) and attached a spurious and totally undefined doctrine to it called "collateral victim." Together, the statue and the doctrine represent a new cause of action in the State of West Virginia. Obviously, this Court has the inherent authority to recognize a new cause of action. However, there are limited ways in which this may constitutionally be accomplished. First, a party may advocate a new theory at the trial level, prevail, and on appeal this Court may recognize the new cause of action. Second, if a party advocates a new cause of action below, but is prevented from litigating the matter, on appeal this Court may recognize the unlitigated new cause of action and remand the matter for trial. *See West Virginia Human Rights Comm'n v. Wilson Estates, Inc.*, 202 W. Va. 152, 503 S.E.2d 6 (1998) (recognizing a new unlitigated cause of action on appeal and remanding for trial); *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996) (recognizing a new unlitigated cause of action on a certified question to the Court and remanding for trial); *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978) (recognizing a new unlitigated cause of action on appeal and remanding for trial). Until the decision in this case, this Court has never *sua sponte* created a cause of action and decided the merits of the new cause of action against a defendant. Anglo-American jurisprudence simply prohibits such conduct by an appellate court.

parties envisioned the resolution of their controversy on this ground. By its decision in this case, the majority has determined that in West Virginia a plaintiff no longer has to present a claim at the trial court level in order to prevail. The majority decision proclaims that the Supreme Court of Appeals of West Virginia has the authority to create a cause of action for a plaintiff and to render judgment for him or her. Further, the majority decision has stated unequivocally that in West Virginia a defendant no longer has a right to know the basis of a cause of action and no longer has a right to present evidence on a cause of action. This view of litigants' rights is erroneous.

Fundamental to the jurisprudence of all civilized nations is the idea of notice and an opportunity to be heard for all parties. In the United States, this concept has taken on constitutional dimensions.[3] In both the federal constitution and the West Virginia Constitution, due process of law has been guaranteed to everyone.[4] The most basic of the procedural safeguards guaranteed by the due process provisions of our state and federal constitutions are notice and the opportunity to be heard, which are essential to the jurisdiction of the court in

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[3] "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 246, 64 S. Ct. 599, 606, 88 L. Ed. 692, 705 (1944).

[4] Article III, Section 10, of the West Virginia Constitution guarantees that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." This same guarantee is articulated in the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law." Over sixty years ago, this Court firmly stated that "[t]he due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard." Syl. Pt. 2, *Simpson v. Stanton*, 119 W. Va. 235, 193 S.E. 64 (1937).

any pending proceeding." *State ex rel. United Mine Workers of America, Local Union 1938 v. Waters,* 200 W. Va. 289, 297, 489 S.E.2d 266, 274 (1997). *See Chesapeake & Ohio Sys. Fed'n v. Hash,* 170 W. Va. 294, 299, 294 S.E.2d 96, 101 (1982). Moreover, "the court which undertakes to determine the rights of the parties must have jurisdiction of the proceeding, ... the parties to the proceeding must have due notice, and ... they must be afforded a reasonable opportunity to be heard before their rights are adjudicated or determined." *Walter Butler Bldg. Co. v. Soto,* 142 W. Va. 616, 636, 97 S.E.2d 275, 287 (1957). *See also State ex rel. Peck v. Goshorn,* 162 W. Va. 420, 249 S.E.2d 765 (1978); *State ex rel. Payne v. Walden,* 156 W. Va. 60, 190 S.E.2d 770 (1972); *State ex rel. Bowen v. Flowers,* 155 W. Va. 389, 184 S.E.2d 611 (1971).

Due process of law prohibits all courts from denying any defendant the right to know, in advance, the basis of a plaintiff's cause of action.[5] Due process of law also prohibits all courts from denying a defendant the right to present a defense to a cause of action.[6] "Both federal and state due process clauses

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[5] The majority decision has also stripped plaintiffs of the right to know in advance upon what theory they, themselves, will proceed. Obviously, plaintiffs will not complain about the loss of this right, because they will always benefit from the majority's new procedure of *sua sponte* creating and deciding the merits of a new and unlitigated cause of action.

[6] It was firmly set out in Syllabus point 1 of *Simpson v. Stanton,* 119 W. Va. 235, 193 S.E. 64 (1937) that the constitutional guarantee of due process law,

> properly applied, secures to a litigant a reasonable opportunity to be heard when the processes of the courts are invoked against him; and where that opportunity has been denied by the refusal to grant a reasonable time in which to prepare and file pleadings setting up his defense, this [C]ourt will not pass on the merits of the case until opportunity is given to file such pleadings in the court of original jurisdiction, and a hearing had thereon in said court.

require that a party to a law suit be afforded adequate notice and a realistic opportunity to be heard in his own defense." *State ex rel. Thomas v. Neal,* 171 W. Va. 412, 413, 299 S.E.2d 23, 25 (1982). The majority opinion has proclaimed that due process of law no longer exists in West Virginia for civil defendants. *But see Mellon-Stuart Co. v. Hall,* 178 W. Va. 291, 300, 359 S.E.2d 124, 133 (1987) ("Longstanding due process protections such as notice and an opportunity to be heard are scrupulously applied."); *Schupbach v. Newbrough,* 173 W. Va. 156, 158, 313 S.E.2d 432, 435 (1984) ("The due process clauses of our State and Federal Constitutions afford parties the procedural rights of notice and opportunity to be heard."). The majority decision has taken an affirmative position that in West Virginia civil defendants are *persona non grata.*

The decision in this case clearly signals that the majority has lost touch with the constitutional restraints on this Court. The majority has no authority to create a cause of action against a defendant, to refuse to permit the defendant to defend the cause of action, or to pronounce judgment against the defendant on the new unlitigated cause of action.[7] [B]efore there can be

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[7] We previously have attempted to articulate the facets of constitutional due process:

> Though it is difficult, perhaps impossible, to define fully and accurately due process of law or to visualize or enumerate the particular requirements of due process of law in the various and complicated situations which occur in the field of constitutional law, due process of law has been held to mean that the court which undertakes to determine the rights of the parties must have jurisdiction of the proceeding, that the parties to the proceeding must have due notice, and that they must be afforded a reasonable opportunity to be heard before their rights are adjudicated or determined. It has been stated generally that the requirement of due process of law is satisfied when a trial is had according to the settled course of judicial proceedings as regulated by the law of the state. This Court

any final adjudication of [a litigant's] property rights, a person deprived of property must be afforded notice and a reasonable opportunity to be heard." *Anderson v. George*, 160 W. Va. 76, 77, 233 S.E.2d 407, 408 (1977). The majority's *sua sponte* procedure in this case undermines the essence of democracy and fair play. "It is fundamental to our constitutional structure that parties will be treated fairly by government and courts." *State ex rel. Graves v. Daugherty*, 164 W. Va. 726, 727, 266 S.E.2d 142, 143 (1980).[8]

I must, therefore, strongly dissent from the majority's decision regarding the five plaintiffs who were under the age of 40 at the time of the alleged discriminatory action. I am authorized to state that Justice Maynard joins me in this dissent and also reserves the right to file a separate opinion.

> has said that due process of law means the due course of legal proceedings according to the rules and the forms which have been established for the protection of private rights. Due process of law is such procedure as is within the limits of those fundamental principles of liberty and justice which underlie our civil and political institutions. One requirement of due process of law is that every defendant must be given his day in court. The underlying purpose of the due process of law clauses of the federal and state constitutions is to guarantee that the rights of persons may be dealt with in judicial proceedings only after due notice and a fair and reasonable opportunity for a hearing in accordance with procedure which has been ordained for the preservation of personal and property rights.

Walter Butler Bldg. Co. v. Soto, 142 W. Va. 616, 636, 97 S.E.2d 275, 287 (1957) (citations omitted).

[8] "One of the basic constitutional guarantees of due process is, of course, that no one shall be deprived of a substantial right by an arm of the State without notice and the opportunity to be heard in a meaningful manner." *In re Willis*, 157 W. Va. 225, 239, 207 S.E.2d 129, 138 (1973).

Maynard, Justice, concurring in part; dissenting in part;

I concur with Justice Davis' dissent, but I write separately to reiterate a crucial point. Even though I cannot say it any better than Justice Davis did in footnote 2, let me be perfectly clear that this Court cannot and should not *sua sponte* create a new cause of action and simultaneously decide the merits of the new cause of action against the defendant.

Justice Davis mentions the only two ways this Court can constitutionally recognize a new cause of action. Because I believe this is so important, let me say it again: (1) a party may advocate a new theory at the trial level and prevail; on appeal, this Court may recognize the new cause of action, or (2) a party may advocate a new cause of action at the trial level but be prevented from litigating the matter; on appeal, this Court may recognize the unlitigated new cause of action and remand for trial. That did not happen here.

By creating a new cause of action and turning the decision on this new cause of action, the majority denies this defendant due process. The defendant has not had and will not have the opportunity to rebut a cause of action under W.Va. Code § 5-11-9(7)(A) and the collateral victim doctrine because no such evidence was presented in this case.

Because I believe in the Constitution of the United States and the Constitution of the State of West Virginia, I dissent. I am authorized to state that Justice Davis joins me in this dissent.

APPENDIX B

IN THE CIRCUIT COURT OF McDOWELL COUNTY,
WEST VIRGINIA

Civil Action No: 93-C-441-K

JOE BAILEY, ET AL,
Plaintiffs,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant,

and

Civil Action No. 94-C-39-K

EDDIE S. CALDWELL, ET AL,
Plaintiffs,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant

RECEIVED & FILED
CIRCUIT CLERK
McDOWELL COUNTY, W.VA
1997 MAR 25

JUDGMENT ORDER ON LIABILITY

The plaintiffs, Joe Bailey, et al, by and through their attorneys, William Flanigan and Lane O. Austin, and the defendant, Norfolk and Western Railway Company, by and through its attorneys, Wade T. Watson, Jeffrey S. Berlin and Mark E. Martin, came before the Court on February 19, 1997 for a Trial on the plaintiffs' Complaint seeking a judgment of liability against this defendant for violating rights guaranteed unto these plaintiffs by the West Virginia Human Rights Act (HRA), § 5-11-9. The Court summoned a venire panel from McDowell County, West Virginia on February 19, 1997. The Clerk called ten (10) jurors to serve, and after questioning by the Court, counsel for the plaintiffs and counsel for the defendant, six (6) McDowell County residents were chosen to serve as jurors and two (2) additional jurors were empaneled to serve as alternates. These jurors were sworn to serve in accordance with the laws of the State of West Virginia and the rules of the Circuit Court of McDowell County.

The plaintiffs and the defendant submitted evidence, exhibits and testimony to the jury from February 19, 1997 through February 26, 1997, with a three-day weekend intervening. The Norfolk and Western Railway Company moved for a directed verdict at the conclusion of the plaintiffs' evidence and at the conclusion of all the evidence presented, which Motions were DENIED by the Court.

On the afternoon of February 26, 1997, following arguments of counsel and the reading of the Instructions by the Court, the liability issue under *W. Va. Code* § 5-11-9 was submitted to the jury. After deliberation, the jury returned the VERDICT FORM to the Court. The VERDICT FORM was read in open Court, with each juror acknowledging that the verdict, as read, was their unanimous judgment. The VERDICT FORM was completed by the jury as follows:

(1) Do you find by a preponderance of the evidence that the defendant, Norfolk and Western Railway Company, intentionally discriminated against the plaintiffs on the basis of age?

ANSWER: Yes.

/s/ Roger L. Price
FOREPERSON

(2) If you have answered YES to Interrogatory #1, do you find by a preponderance of the evidence that an elicit bias against employees forty years of age or older was a motivating factor in defendant Norfolk and Western Railway Company's decision to place plaintiffs at the bottom of the conductor seniority roster with a conductor date of April 1, 1992?

ANSWER: Yes.

/s/ Roger L. Price
FOREPERSON

(3) If you have answered YES to Interrogatory #2, do you find that the defendant, Norfolk and Western Railway Company, has shown by a preponderance of the evidence that it would have placed plaintiffs on the bottom of the conductor seniority roster with a conductor date of April 1, 1992 even absent the impermissible age motivation?

ANSWER: No.

/s/ Roger L. Price
FOREPERSON

All VERDICT FORMS were inspected by the Court and were properly signed by the Foreperson, Roger L. Price, and all jurors were individually polled and answered affirmatively that the verdicts, as read, were their unanimous judgment on the issues submitted.

The defendant, Norfolk and Western Railway Company, notes its objection and exception to the jury's verdict as rendered and is instructed to file all post-trial Motions, in writing, within ten (10) days of the entry of this ORDER.

ENTERED this the 11th day of March, 1997.

/s/ Kendrick King

HON. KENDRICK KING, JUDGE

INSPECTED BY:

/s/ William Flanigan

WILLIAM FLANIGAN, ESQ.
LANE O. AUSTIN, ESQ.
COUNSEL FOR PLAINTIFFS
320 Courthouse Road
Princeton, WV 24740

/s/ Wade T. Watson

WADE T. WATSON, ESQ.
COUNSEL FOR
DEFENDANT
617 Law & Commerce
Building
Bluefield, WV 24701

Jeffrey S. Berlin, Esq.
Mark E. Martin, Esq.
Counsel for Defendant
Washington, DC 20006

A TRUE COPY TESTE:
SALLY W. CHILDERS, CLERK
BY /s/ Judy Meyer

DEPUTY CLERK

APPENDIX C

IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

Civil Action No: 93-C-441-K

JOE BAILEY, ET AL,
Plaintiffs,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant,

and

Civil Action No. 94-C-39-K

EDDIE S. CALDWELL, ET AL.,
Plaintiffs,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
Defendant

ORDER DENYING DEFENDANT'S MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, A MOTION FOR A NEW TRIAL

This Court has before it the defendant's Motion for a Judgment Notwithstanding the Verdict or, alternatively, a Motion for a New Trial. The Court, having presided over this matter and heard the evidence presented to the jury and having further reviewed the written pleadings of both parties and heard

arguments of counsel, DENIES the Motions of the defendant and AFFIRMS the jury's verdict in favor of the plaintiffs on their claims of age discrimination.

A trial court is empowered to grant a new trial only when the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice. *See, Witt vs. Sleeth*, 481 S.E.2d 189 (W.Va. 1996). The Court finds none of these factors present here. The jury's verdict in favor of the plaintiffs is supported by substantial evidence on each element of the plaintiffs' claims of age discrimination and there is no basis for disturbing the jury's findings on these factual elements.

The defendant railroad, in its Rule 50 Motion for a Judgment Notwithstanding the Verdict, urges upon the Court the same arguments it has made in Pre-Trial Motions and presentations made at various stages of the trial proceedings. The Court has addressed these arguments many times in its rulings at the various stages of these proceedings and reaffirms those rulings at this time, holding that the Norfolk and Western Railway Company has not met the requirements of Rule 50 to be entitled to a judgment on the legal issues involved in this case as a matter of law. The jury's verdict on the issue of liability under the West Virginia Human Rights Act and specifically upon the plaintiffs' claims of age discrimination are AFFIRMED.

The jury verdict in favor of the plaintiffs on the merits of their age discrimination claim is herewith entered as a judgment of liability against the railroad and in favor of the plaintiffs.

The Court notes that this matter was bifurcated, with the issue of liability tried and the issue of damages of the sixty-nine (69) victims of age discrimination reserved until the jury's determination on the merits of the underlying claim. In

accordance with Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court finds no just reason for delaying the railroad's right to appeal the issue of liability and directs that this is a FINAL, APPEALABLE ORDER on the issue of the defendant railroad's liability to the plaintiffs on their claims of age discrimination.

The Court stays further proceedings on the issue of damages in this bifurcated matter pending the defendant railroad's appeal on the jury's finding of liability to the West Virginia Supreme Court of Appeals.

The Court notes the objection of the defendant railroad to its ruling and its rights to appeal are fully preserved.

ENTERED this the 4th day of May, 1998.

/s/ Kendrick King

HON. KENDRICK KING, JUDGE
Circuit Court of McDowell Co., WV

A TRUE COPY TESTE:
SALLY W. CHILDERS, CLERK
BY /s/ Judy Meyer

DEPUTY CLERK

APPENDIX D

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX E

45 U.S.C. § 152 First, a section of the Railway Labor Act, provides:

§ 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

APPENDIX F

45 U.S.C. § 153, a section of the Railway Labor Act, provides, in pertinent part:

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after June 21, 1934, and it is provided–

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any

United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

* * *

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system,

group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the

establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

APPENDIX G

The West Virginia Human Rights Act, W.Va. Code §§ 5-11-1, *et seq.* provides, in pertinent part:

§ 5-11-1. Short title

This article shall be known and may be cited and referred to as "The West Virginia Human Rights Act."

§ 5-11-2. Declaration of policy

It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status.

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

§ 5-11-3. Definitions

When used in this article:

(a) The term "person" means one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal

representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons;

(b) The term "commission" means the West Virginia human rights commission;

(c) The term "director" means the executive director of the commission;

(d) The term "employer" means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year: Provided, That such terms shall not be taken, understood or construed to include a private club;

(e) The term "employee" shall not include any individual employed by his or her parents, spouse or child;

(f) The term "labor organization" includes any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or for other mutual aid or protection in relation to employment;

(g) The term "employment agency" includes any person undertaking, with or without compensation, to procure, recruit, refer or place employees. A newspaper engaged in the activity of advertising in the normal course of its business shall not be deemed to be an employment agency;

(h) The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate;

(i) The term "unlawful discriminatory practices" includes only those practices specified in section nine [§ 5-11-9] of this article;

(j) The term "place of public accommodations" means any establishment or person, as defined herein, including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private. To the extent that any penitentiary, correctional facility, detention center, regional jail or county jail is a place of public accommodation, the rights, remedies and requirements provided by this article for any violation of subdivision (6), section nine [§ 5-11-9(6)] of this article shall not apply to any person other than: (1) Any person employed at a penitentiary, correctional facility, detention center, regional jail or county jail; (2) any person employed by a law-enforcement agency; or (3) any person visiting any such employee or visiting any person detained in custody at such facility;

(k) The term "age" means the age of forty or above;

(l) For the purpose of this article, a person shall be considered to be blind only if his central visual acuity does not exceed twenty/two hundred in the better eye with correcting lenses, or if his visual acuity is greater than twenty/two hundred but is occasioned by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than twenty degrees; and

(m) The term "disability" means:

(1) A mental or physical impairment which substantially limits one or more of such person's major life activities. The term "major life activities" includes functions

such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

(2) A record of such impairment; or

(3) Being regarded as having such an impairment.

For the purposes of this article, this term does not include persons whose current use of or addiction to alcohol or drugs prevents such persons from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

* * *

§ 5-11-9. Unlawful discriminatory practices

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:

(1) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or disabled: Provided, That it shall not be an unlawful discriminatory practice for an employer to observe the provisions of any bona fide pension, retirement, group or employee insurance or welfare benefit plan or system not adopted as a subterfuge to evade the provisions of this subdivision;

(2) For any employer, employment agency or labor organization, prior to the employment or admission to membership, to: (A) Elicit any information or make or keep a

record of or use any form of application or application blank containing questions or entries concerning the race, religion, color, national origin, ancestry, sex or age of any applicant for employment or membership; (B) print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specifications or discrimination based upon race, religion, color, national origin, ancestry, sex, disability or age; or (C) deny or limit, through a quota system, employment or membership because of race, religion, color, national origin, ancestry, sex, age, blindness or disability;

(3) For any labor organization because of race, religion, color, national origin, ancestry, sex, age, blindness or disability of any individual to deny full and equal membership rights to any individual or otherwise to discriminate against such individual with respect to hire, tenure, terms, conditions or privileges of employment or any other matter, directly or indirectly, related to employment;

* * * * *

APPENDIX H

IN THE CIRCUIT COURT OF MCDOWELL COUNTY,
WEST VIRGINIA

CIVIL ACTION NO. 93-C-441

JOE. W. BAILEY, RONALD W. BARNHILL,
DONALD W. BLACKWELL, JOSEPH C. BLEVINS,
ELBERT H. BOLEN, JR., MICHAEL L. BRATTON,
ARTHUR BROWN, JR., EDDIE S. CALDWELL,
FRED B. CALDWELL, JR., GARY M. CALDWELL,
RICHARD CARPER, JERRY C. COCHRAN,
JOHN E. DAMRON, JR., CROCKETT S. DAVIDSON,
TOMMY D. DESKINS, RICHARD D. DISSIBBIO,
T. H. ELLISON, JR., DAVID R. ERNEST,
JOHN W. FINE, RAYMOND FOSTER, JR.,
EDWARD B. FRENCH, ROBERT R. FULP,
JACK H. GILLESPIE, GEORGE C. GRAHAM,
ROGER S. HALE, DONNIE R. HARRY,
RONALD B. HATFIELD, LESTER HAWKINS, SR.,
DOUGLAS HEDRICK, HUBERT J. HORN,
WESLEY L. HURT, JACK L. KIPFINGER,
MACK A. LAW, JAMES N. LUCAS,
NORMAN C. MABE, ALVIN D. MARCHANT,
DAVID L. MARSH, ROGER W. MARTIN,
HAROLD L. MILLER, ROY D. MILLER, III,
RONALD E. MILLSAP, FRANK W. MITCHELL,
DONALD H. NORMAN, JAMES W. PAINTER,
MELVIN L. PANNELL, RANDOLPH V. PARHAM,
RAYMOND E. POOLE, ROGER W. PROFFITT,
SESTO PUNTURI, JR., KENNETH W. RICHARDSON,
EMMETT W. SANDERS, JACK L. SARVER,
LARRY J. SARVER, SYLVESTER SHREWSBURY, JR.,

PLAINTIFFS (CONT'D)

RONNIE W. SIMMONS, THOMAS J. SIMMONS,
PERRY C. SIMPSON, JERRY W. SMITH,
ROGER L. SMITH, RONNIE C. THOMAS,
ROBERT K. TILLER, JEROME D. TRAVERS,
DAVID B. VARNEY, ELVIE R. WEATHERLY,
ISAAC L. WILSON, JIMMY L. WOODY,
WILLIAM F. YOST,

PLAINTIFFS,

v.

NORFOLK AND WESTERN RAILWAY,

DEFENDANT.

VOLUME TWO
(PGS 345-883)
JANET L. MURPHY,
OFFICIAL COURT REPORTER

A transcript of proceedings had and testimony taken before **THE HONORABLE KENDRICK KING, JUDGE OF CIRCUIT COURT "B"** at the McDowell County Courthouse Annex in Welch, McDowell County, West Virginia, pursuant to a trial of this case being scheduled; said trial beginning at 9:42 a.m. on this date, the 19th day of February, 1997 and continuing on the 20th, 24th, 25th and 26th of February, 1997.

[885] WEDNESDAY, FEBRUARY 26, 1997

PROCEEDINGS

At 9:10 a.m., proceedings were begun before the Court with parties and counsel present, as indicated:

The COURT: It is, approximately, 9:10 a.m., and this is Wednesday, February 26, 1997. The case on docket for the fifth day of jury trial is Joe Bailey and others, as Plaintiffs, versus Norfolk and Western Railway Company, as Defendants, Civil Action No. 93-C-441. Let the record show that the lead Plaintiff, Mr. Joe Bailey, appears in person and by counsel, William Flanigan and Lane Austin.

The Defendant railroad, at this time, does not have any of its representatives present but does appear by counsel, Jeffrey S. Berlin, Mark E. Martin and Wade T. Watson.

We are outside the presence of the jury, which is not scheduled to report for at least, well, weren't scheduled to report until 10:15 a.m. for the starting of the jury's portion of this trial proceeding. The Court bailiff is posted at the entrance door so that if any jurors do get here while we are in this session, considering instructions and so forth, that he'll stop us, we'll let the juror pass through, and [886] then, we'll continue on.

Are the Plaintiffs ready, Mr. Flanigan?

MR. FLANIGAN: Yes, Your Honor.

THE COURT: Is the Defendant ready, Mr. Berlin?

MR. BERLIN: The Defendant's ready, Your Honor.

THE COURT: Counsel, we will begin by going over the general civil charge, and I'll go over the items that the Court proposes to give, and I'll move on, unless and until one counsel

or the other stops me and makes an objection or brings something else to the Court's attention.

* * *

[930] Is there objection to Defendant's 4, Counsel?

MR. FLANIGAN: Your Honor, only the--- You had indicated to us that you were going to give an instruction on the arbitrator's award. I would strike only, "and it is not intentional age discrimination" on the last line. That is an issue for the jury, but up to that point, I think it's a fair characterization of what---

THE COURT: (Interposing) Let's do it this way. Starting on the first line, I'm not going to say, "As I have said" so it'll say, "N and W has offered the explanation" and so forth, and down in the middle where it says, "You're instructed that" that will be deleted and say, "This arbitration award is conclusive and binding on you with regard to the meaning of the 1954 Labor Agreement as it applies to Plaintiffs; [931] therefore, the N and W's placing of Plaintiffs on the bottom of the conductor roster was permitted by the 1954 Labor Agreement. You may find that this employer action was taken to comply with the facially neutral collective bargaining agreement and was a lawful, nondiscriminatory reason."

Now, any objection to the instruction as proposed to be amended by the Court by the Defendant?

MR. BERLIN: Can--- If you can bear with me just one second, Your Honor.

THE COURT: Well, let's go with the Plaintiffs while the Defendant is doing that. Any objection, continuing objection, by Plaintiffs to the proposed amended instruction, Mr. Flanigan?

MR. FLANIGAN: No, Your Honor, as amended, we have no objection.

THE COURT: Is the Defendant opposed to the Court's amendment of instruction, Mr. Berlin?

MR. BERLIN: We have no problem with it, other than the reference to the placing of the Plaintiffs on the bottom of the conductor roster was permitted by the 1954 Labor Agreement. It should be, "was required" and to be consistent with what they were--- they were.

[932] THE COURT: Well, the Court does not interpret the--- and apply to the facts of this case and the circumstances of this case the arbitrator's decision to have indicated that it was mandatory and, thereby, required, but to indicate that it was permissible and lawful for the employer to do that under the collective bargaining agreement, standing alone.

So, the Court's going to give No. 4 as amended. Now, again, so we're clear about it, Mr. Berlin, does the Defendant object or not to the giving of the amended instruction.

MR. BERLIN: We do, we think the instruction ought to be further amended to say, "required."

THE COURT: The Defendant, then, does object for reasons stated.

* * *

[943] At 10:53 a.m., the jury was returned to the courtroom, and the jury charge was conducted by the Court.

THE COURT: Ladies and Gentlemen of the Jury, I would say "Good Morning," but I guess, it is now, "Good Midday" at least.

I will now instruct you concerning the law that you must follow in your deliberations as a jury in this case.

* * *

[953] The Plaintiffs' right to be free from age discrimination under the West Virginia Human Rights Act, exists independently of the rights under the Federal Railway Labor Act or any other federal law and, also, exists independently of the rights under their collective bargaining agreement through their union, the United Transportation Union, with the Defendant Railroad. In deciding this case, you should consider the totality of circumstances from all the evidence in this case, and you should consider the whole package of terms and conditions of employment of [954] the Plaintiffs as railroad employees.

A person protected from unlawful age discrimination under the West Virginia Human Rights Act, cannot, directly or indirectly, consent to or waive unlawful age discrimination, either individually, or through his union, or otherwise.

* * *

[959] The Norfolk and Western Railway was offered the explanation that it put Plaintiffs on the bottom of the conductor roster with a seniority date of April 1, 1992 because that is what the railroad's 1954 labor agreement with the United Transportation Union required. Norfolk and Western has offered in evidence an arbitration award issued under the Railway Labor Act, a federal statute which rules that Norfolk and Western's putting Plaintiffs on the bottom of the conductor roster is in compliance with the 1954 labor agreement. This arbitration award is conclusive and binding on you with regard to the meaning of the 1954 labor agreement, as it applies to Plaintiffs. Therefore, the Norfolk and Western's placing of Plaintiffs on the bottom of the conductor roster was permitted by the 1954 labor agreement. You may find that this employer action was taken to comply with a facially neutral collective bargaining agreement and was a lawful discriminatory reason.

* * *

APPENDIX I

No. 26004
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

JOE BAILEY, *et al.*, *Appellees and Plaintiffs Below,*	)	Civil Action No. 93-C-441-K
v.	)	Circuit Court of McDowell County, WV
NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant and Defendant Below.*	)	
EDDIE S. CALDWELL, *et al.*, *Appellees and Plaintiffs Below,*	)	Civil Action No. 94-C-39-K
v.	)	Circuit Court of McDowell County, WV
NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant and Defendant Below.*	)	

BRIEF FOR APPELLANT

June 8, 1999

* * * *

III. ASSIGNMENTS OF ERROR, POINTS AND AUTHORITIES RELIED UPON, AND DISCUSSION OF LAW.

[15] This case should never have been allowed to go to the jury, and the jury's verdict, once rendered, should not have been allowed to stand. NW did nothing wrong in promoting plaintiffs to conductor and placing them on the bottom of the conductor roster. In taking these steps, NW was exercising authority given to it by Congress in Pub. L. No. 102-29, and following the rules laid down in the age-neutral 1954 NW-UTU labor agreement. These uncontroverted facts preclude any finding of intentional age discrimination violative of the HRA.

Plaintiffs' case was built on confusion and appeals to the jury's emotions, not facts. Their success in obtaining a verdict in this manner does not make the verdict permissible. No rational juror could find from the evidence that NW would not have promoted plaintiffs and put them at the bottom of the roster if plaintiffs had been younger. To credit the jury's verdict of liability would dishonor the HRA's legitimate function, and work a manifest injustice to the railroad.

In reality, this case has nothing to do with age bias and everything to do with plaintiffs' desire to undo the results of the RLA's elaborate and carefully designed dispute resolution processes -- processes that bring a stability to the railroad industry that benefits railroads and employees alike. Plaintiffs, in particular, are trying to use the HRA to reserve changes in the railroad industry worked by Congress' enactment of PEB 219's recommendations, and by PLB 4721's final and binding determination that NW was properly applying the 1954 agreement to the trainmen newly required to become conductors by virtue of Congress' action. But that is not a proper use of the HRA. The HRA permits jurors to hold

employees accountable for age discrimination -- and there is none here.

* * *

[20] Accordingly, when the Norfolk Southern railroads came to rank the 2,067 newly promoted trainmen, the railroads looked to their labor agreements. On the NW proper, the 1954 agreement governs conductor seniority for trainmen hired before November 1, 1985. Because plaintiffs were hired before that date, NW applied the 1954 agreement to them. The 1954 agreement requires that newly promoted conductors be placed at the bottom of the roster, with a date that is the date they pass the conductor exam. NW put plaintiffs, and all the other newly promoted pre-November 1, 1985 Pocahontas Division trainmen, at the bottom of the conductor roster, with dates of April 1, 1992, because that is what the 1954 agreement requires. Age played no part in the process.

When UTU took issue with how NW was ranking its newly promoted trainmen, the parties took the matter to arbitration under the RLA. PLB 4721 determined that NW was correct in applying the 1954 agreement to its pre-November 1, 1985 trainmen, and that placement of these employees at the bottom of the conductor roster was a correct interpretation of this agreement. UTU did not seek judicial review of the board's decision (available under 45 U.S.C. § 153 First (q)), and once the board settled the dispute, its determination governed the matter. The board's ruling as to the meaning of the 1954 labor agreement is conclusive and binding on this Court. *Owens v. Texaco, Inc.*, 857 F.2d 262, 265 (5th Cir. 1988).

* * *

[23] Instead of proving age discrimination, plaintiffs improperly encouraged the jury to override NW's application of the 1954 agreement to them as supposedly unfair, because

they had been forced to accept promotion. PLB 4721 has definitively ruled that the 1954 agreement applies to *all* trainmen hired before November 1, 1985, those forced to become conductors no less than those who became conductors voluntarily. That determination is binding here. *Owens v. Texaco, Inc.*, 857 F.2d at 265. Seniority is a product of labor agreements. *E.g., Local 1251, UAW v. Robertshaw Controls Co.*, 405 F.2d 29, 33 (2d Cir. 1968) (en banc). Plaintiffs *are not owed* any more conductor seniority under their agreement than they received. The HRA itself does not give them a right to more because, as a matter of law, it is not age discrimination for NW to afford plaintiffs the seniority to which they are entitled under the ordinary operation of the facially neutral 1954 labor agreement.[25]

The HRA did not permit the jury to implement its own sense of equity at plaintiffs' urging, Tr. 970-71, 978, simply because plaintiffs are upset at the results reached through RLA procedures that for more than sixty years have served the interests of employees and railroads alike by promoting stability in labor-management relations. The HRA protects only against decisions made on the basis of age, and there were no

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[25] Plaintiffs suggested that age bias could be found in their being placed on the conductor roster behind employees with less trainman experience. But the evidence does not permit any such inference. The undisputed fact is that, as PLB 4721 conclusively ruled, the 1954 agreement *required* NW to put plaintiffs at the bottom of the conductor roster *regardless* of their experience as trainmen, and *regardless* of whether they previously had experience as conductors. Moreover, in any event, "an employer's consideration of experience or its failure to do so is not tantamount to making employment decisions on the basis of age." *Lincoln v. Billington*, C.A. No. 95-cv-0468, 1998 U.S. Dist. LEXIS 938, LEXIS op. at *18 (D.D.C. January 28, 1998), *aff'd*, No. 98-5242 (D.C. Cir. October 29, 1998).

such decisions here. *See, e.g., Skaggs v. Elk Run Coal Co.*, 479 S.E.2d 561, 589 (W. Va. 1996).[26]

* * *

[40] In the end, this case is not about age discrimination made actionable by the HRA. Rather, it represents an impermissible intrusion into the federally regulated area of railroad labor relations and the RLA's carefully constructed dispute resolution schemes. The matter of mandatory promotion to conductor was resolved at the highest levels, through national bargaining, a Presidential Emergency board, and federal legislation. Congress (through its delegate the Special Board) found mandatory promotion to be "fair" and "equitable," knowing full well that, under existing labor agreements, it would result in senior trainmen like plaintiffs going to the bottom of conductor rosters. [41] When UTU challenged NW's implementation of the authority it received from Congress, PLB 4721 conclusively ruled in final and binding arbitration under the RLA that NW was correctly applying the 1954 agreement by placing the newly promoted trainmen at the bottom of the conductor roster — the very result Congress had anticipated. Plaintiffs think this resolution produces a result unfair to them, and would use this lawsuit to undo it. But the HRA does not give jurors a roving commission to nullify an Act of Congress and the dictates of the facially neutral 1954 labor agreement in the absence of any evidence that would permit a rational juror to find that NW acted out of age bias.

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[26] The *Hiatt* plaintiffs similarly argued that the existing seniority rules did not apply to them because they had been forced to become conductors. The court rejected this argument, explaining.

(continued...)

Our case is factually identical to *Hiatt* in all material respects. Like *Hiatt* is should have been resolved on summary judgment for the railroad — and failing that, on directed verdict. Once the jury ruled, its verdict should have been set aside, as NW's treatment of plaintiffs reflected no more than "the interaction of the congressional mandate and the established seniority system," *Hiatt*, 65 F.3d at 843.

The Circuit Court inexplicably abdicated its responsibility to superintend the jury's decisionmaking. When "the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of this Court," reviewing the matter *de novo*, "to reverse the circuit court and to order judgment for appellant." *Mildred L.M. v. John O.F.*, 452 S.E.2d 436, 440 (W. Va. 1994); *accord Hines v. Hills Department Stores*, 454 S.E.2d 385, 391 (W.Va. 1994). That must be the outcome here. It is contrary to the only conclusion that a reasonable reading of the evidence permits, indefensible under the HRA, and manifestly unjust for NW to be found liable for doing what Congress authorized and the 1954 labor agreement with UTU required.

* * * *

APPENDIX J

No. 26004
SUPREME COURT OF APPEALS OF
WEST VIRGINIA

JOE BAILEY, *et al.*, *Appellees and Plaintiffs Below,*	)	Civil Action No. 93-C-441-K
v.	)	Circuit Court of McDowell County, WV
NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant and Defendant Below.*	)	
EDDIE S. CALDWELL, *et al.*, *Appellees and Plaintiffs Below,*	)	Civil Action No. 94-C-39-K
v.	)	Circuit Court of McDowell County, WV
NORFOLK AND WESTERN RAILWAY COMPANY, *Appellant and Defendant Below.*	)	

REPLY BRIEF FOR APPELLANT

August 2, 1999

* * *

[5] Plaintiffs' misstatements are really just a smokescreen for what has always been their real point: that it supposedly just does not matter that NW's actions were the result of the railroad's compliance with the 1954 agreement, because rights under the HRA are separate and distinct from rights under a labor agreement. Plaintiffs' argument is contrary to *Yoho v. Triangle PNC, Inc.*, 336 S.E.2d 204 (W. Va. 1985) ("*Yoho*"), and analogous federal cases establishing that an employer's showing that its action was the product of what the provisions in a facially neutral labor agreement require *is* a full defense to a claim of intentional age discrimination.[3]

Moreover, NW *does not argue*, as plaintiffs wrongly assert (Appellees' Br. at 40), that PLB 4721's award precludes plaintiffs' HRA claim or is binding on this Court as regards NW's motives for its actions. *See Wheeling-Pittsburgh Steel Corp. v. Rowing*, No. 25825, 1999 W. Va. LEXIS (W. Va. July

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[3] *Yoho* held that when an employer shows that its actions were "mandated by a facially neutral provision of the collective bargaining agreement," a claim of intentional discrimination does not lie. 336 S.E.2d at 210. Plaintiffs (Appellees' Br. at 36-37) purport to distinguish *Yoho* as a *Harless*-type intentional infliction of emotional distress case. *See Harless v. First National Bank in Fairmont*, 289 S.E.2d 692 (1982). Although *Yoho* did contain a *Harless*-type claim, this Court also considered a claim of discrimination under the West Virginia Workers' Compensation Act, which is governed by the same principles that apply under the HRA, *St. Peter v. Ampak-Division of Gatewood Products, Inc.*, 484 S.E.2d 481 (W. Va. 1997).

The principle recognized in *Yoho* is equally established in the federal case law addressing antidiscrimination statutes. *E.g., Ellis v. United Airlines*, 73 F.3d 999, 1006 (10th Cir. 1996) (intentional age discrimination claim fails in view of defendant's showing that its treatment of plaintiffs "was a product of its collective bargaining agreement"); *Zimmerman v. General Motors*, 959 F. Supp. 1393, 1399 (D. Kan. 1997); *Benitez v. Portland General Electric*, 799 F. Supp. 1075, 1078-79 (D. Ore. 1992).

16, 1999); *Vest v. Board of Education,* 455 S.E.2d 781 (W. Va. 1995). Rather, the point is that by operation of the RLA, PLB 4721's ruling *as to the meaning of the 1954 agreement* is binding and conclusive on this Court. *Owens v. Texaco, Inc.,* 857 F.2d 262, 265 (5th Cir. 1988).

[6] This is a critical point. Although plaintiffs pay lip service to PLB 4721's having determined the meaning of the 1954 agreement, their supposed defense of the verdict depends entirely on the agreement's being accorded some meaning other than the one PLB 4721 determined. Thus, as we discuss below, much of plaintiffs' brief turns on their contention that the jury could reasonably have drawn an inference of age discrimination from certain circumstances, like plaintiffs' placement on the conductor roster behind much less experienced trainmen. But given that, as PLB 4721 ruled, the 1954 agreement *required* NW to place plaintiffs at the bottom of the conductor roster regardless of any other factors (like plaintiffs' abilities, experience, or tenure with the railroad), the fact that NW put plaintiffs at the bottom cannot permissibly give rise to an inference of age bias. Plaintiffs' putative defense of the jury verdict largely founders on this elementary fact alone.[4]

* * * * *

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[4] NW also *does not argue,* as plaintiffs maintain (Appellees' Br. at 48), that a plaintiff cannot prevail in an intentional discrimination action "absent direct proof of an illegal motive." For their part, plaintiffs wrongly say (Appellees' Br. at 15, 33) that the jury need do no more than find that age was a motivating factor in the employer's action. The correct rule is that in order to find intentional discrimination, the jury must also be able *reasonably* to reject an employer's showing that it would have taken the same decision regardless of the plaintiffs' ages. No reasonable juror could have made any such finding here.

APPENDIX K

DEFENDANT'S EXHIBIT 19
DATE: 2/19/97 JUDGE KING
CASE NOS. 93-C441 AND 94-C-39
ADMITTED: OBJECTION

PUBLIC LAW BOARD NO. 4721

AWARD NO. 47
Case No. 47

PARTIES	)	NORFOLK AND WESTERN RAILWAY
TO	)	COMPANY
DISPUTE	)	
	)	UNITED TRANSPORTATION UNION

QUESTIONS AT ISSUE:

1. Does Article V of the 1991 UTU National Agreement require that all trainmen hired prior to November 1, 1985, who have previously relinquished their conductor/foreman rights or declined promotion, accept promotion to conductor/foreman when offered?

2. If the answer to Question No. 1 is Yes, did the Carrier properly place their names on the existing conductor/foreman seniority roster in accordance with their current working agreement?

FINDINGS: This Public Law Board No. 4721 finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction.

The Questions before this Board involve an interpretation of Article V of the 1991 National Agreement. The pertinent portion of this agreement reads as follows:

ARTICLE V – PROMOTION/RETENTION OF SENIORITY

All trainmen must accept promotion to conductor/foreman when offered by the railroad. Once promoted, trainmen, including those already promoted, will not be permitted to voluntarily relinquish conductor/foreman rights.

Except as modified hereby, existing rules and practices governing promotion continue in effect.

The Carrier has argued that the above provision requires all trainmen to accept promotion to conductor, when offered, regardness [sic] of whether they have previously declined promotion or relinquished their rights as conductor.

This Board agrees that Article V provides for such, and therefore, answers Question No. 1 in the affirmative.

On this property there are two agreements in place for promoted conductors to receive their seniority and placement on an applicable roster. One is for employees hired prior to November 1, 1985 (Article 26 of the 1954 Schedule Agreement) and one for employees hired on or after November 1, 1985 (1988 Memorandum Agreement).

The Carrier is currently giving employees hired prior to November 1, 1985 a seniority date equivalent to the date they pass the required Conductor's examination. Their names are then placed at the bottom of the appropriate roster.

Employees hired on or after November 1, 1985 are also given a seniority date equivalent to the date they pass their Conductor's examination. However, they are placed on the Conductor's Seniority roster in relative seniority standing to one another on the Brakemen's roster.

The Carrier argues this is consistent with Paragraph (H) of the 1988 Memorandum Agreement.

This Board has examined the record and finds that the Carrier is properly placing affected employees on the appropriate Conductor's seniority roster consistent with the promotion agreements in place. Therefore the Board also answers Question No. 2 in the affirmative.

This Board is only authorized to interpret the Agreements or parts thereof between parties. If the Board had the power of equity the decision would not be the same.

AWARD: Questions No. 1 and No. 2 are answered in the affirmative.

/s/ Preston J. Moore
Preston J. Moore, Chairman

/s/ L.P. King, Jr.
Union Member

/s/ R.D. Kidwell
Carrier Member

August 24, 1992